

Synopsis of Contemporary Reports

1914—1925

ALL INDIA REPORTER

1914	1916	1918	1920	1922	1924	1925
41 I. A. 36 All. 12 A L J	43 I. A. 38 All. 14 A L J	45 I. A. 40 All. 16 A L J	47 I. A. 42 All. 18 A L J	49 I. A. 44 All. 20 A L J	51 I. A. 46. All. 22 A L J	52 I. A. 47 All. 23 A L J
38 Bom. 16 Bom L R	40 Bom. 18 Bom L R	42 Bom. 20 Bom LR	44 Bom. 22 Bom LR	46 Bom. 24 Bom LR	48 Bom. 26 Bom L R	49 Bom. 27 Bom L R
41 Cal. 18 C W N 19, 20 C. LJ	43 Cal. 20 C W N 23, 24 C L J	45 Cal. 22 C W N 27, 28 C L J	47 Cal. 24 C W N 31, 32 C L J	49 Cal. 26 C W N 35, 36 C LJ	51 Cal. 28 C W N 39, 40 C L J	52 Cal. 29 C W N 41, 42 C L J
1914 P. R. 1914 P L R 1914 P W R 15 Cr L J 22 to 25 I C	1916 P. R. 1916 P L R 1916 P W R 17 Cr L J 32 to 36 I C	1918 P. R. 1918 P L R 1918 P W R 19 Cr L J 43 to 48 I C	1 Lah. 1920 P L R 1920 P W R 21 Cr L J 54 to 58 I C	3 Lah. 1922 P L R 1922 P W R 23 Cr L J 64 to 68 I C	5 Lah. 25 Cr L J 75 to 84 I C	6 Lah. 26 Cr L J 35 to 90 I C
37 Mad 26, 27 MLJ 15, 16 M L T 1 M L W 1914 M W N	39 Mad. 30, 31 MLJ 19, 20 MLT 3, 4 MLW 1916 M W N	41 Mad. 34, 35 MLJ 23, 24 MLT 7, 8 M L W 1918 M W N	43 Mad. 38, 39 M L J 27, 28 MLT 11 12 MLW 1920 M W N	45 Mad. 42, 43 MLJ 30, 31 MLT 15, 16 MLW 1922 M W N	47 Mad. 46, 47 ML J 34, 35 MLT 19, 20 MLW 1924 M W N	48 Mad. 48, 49 MLJ 21, 22 MLW 1925 M W N
10 N. L. R.	12 N. L. R.	14 N. L. R. 1 N L J	16 N. L. R. 3 N L J	18 N. L. R. 5 N L J	20 N. L. R. 7 N L J	21 N. L. R. 8 N L J
17 O. C. 1 O L J	19 O. C. 3 O L J 1 Pat L. J.	21 O. C. 5 O L J 3 Pat L. J.	23 O. C. 7 O L J 5 Pat. L. J.	25 O. C. 9 O L J 1 Pat. 1922 PHCC	27 O. C. 11 O L J 3 Pat. 1924 PHCC 2 Pat L R	23 O. C. 13 O L J 2 O W N 4 Pat. 1925 PHCC 3 Pat L R 6 P L T
7 L. B. R. 2 U. B. R. 7 Bur L T 8 S. L. R.	8 L. B. R. 2 U B. R. 9 Bur L T 10 S. L. R.	9 L. B. R. 3 U B. R. 11 Bur L T 12 S. L. R.	10 L. B. R. 4 U. B. R. 13 Bur. L T 14 S. L. R.	11 L. B. R. 4 U. B. R. 1 Bur L J 16 S. L. R.	2 Rang 3 Bur L J 17 S. L. R.	3 Rang. 4 Bur L J 18 S L R.

Synopsis of Contemporary Reports

1927—1934

ALL INDIA REPORTER

1927	1929	1930	1931	1932	1933	1934
54 I. A. 49 All. 25 A L J	56 I. A. 51 All. 1929 A L J	57 I. A. 52 All. 1930 A L J	58 I. A. 53 All. 1931 A L J	59 I. A. 54 All. 1932 A L J	60 I. A. 55 All. 1933 A L J	61 I. A. 56. All. 1934 A L J
51 Bom. 29 Bom L R	53 Bom. 31 Bom L R	54 Bom. 32 Bom L R	55 Bom. 33 Bom L R	56 Bom. 34 Bom L R	57 Bom. 35 Bom L R	58 Bom. 36 Bom L R
54 Cal. 31 C W N 45,46 C L J	56 Cal. 33 C W N 49, 50 C L J	57 Cal. 34 C W N 51,52 C L J	58 Cal. 35 C W N 53,54 C L J	59 Cal. 36 C W N 55, 56 C L J	60 Cal. 37 C W N 57, 58 C L J	61 Cal. 38 C W N 59,60 C L J
8 Lah. 28 P L R	10 Lah. 30 P L R	11 Lah. 31 P L R	12 Lah. 32 P L R	13 Lah. 33 P L R	14 Lah. 34 P L R	15 Lah. 35 P L R
28 Cr L J 99 to 105 IC	30 Cr L J 113to120 IC	31 Cr L J 121to128 IC	32 Cr L J 129to134 IC	33 Cr L J 135 to140IC	34 Cr L J 141to146IC	35 Cr L J 147 I C to
50 Mad. 52, 53 MLJ 38,39 M L T 25, 26 MLW 1927 MWN	52 Mad. 56,57 M L J 2 Mad Cr C 29,30 MLW 1929 MWN	53 Mad. 58,59 M L J 3 Mad Cr C 31,32 MLW 1930 M W N	54 Mad. 60,61 M L J 4 Mad Cr C 33,34 MLW 1931 MWN	55 Mad. 62, 63 MLJ 5 Mad Cr C 35,36 MLW 1932 MWN	56 Mad. 64,65 MLJ 1933 MCr C 37, 38MLW 1933 MWN	57 M a d. 66,67 M L J 1634 M CrC 39,40 MWN 1934 MWN
23 N. L. R. 10 N L J 1 & 2 Luck	25 N. L. R. 12 N L J 1929 Cr C 4 Luck.	26 N L. R. 13 N L J 1930 Cr C 5 Luck.	27 N. L. R. 14 N L J 1931 Cr C 6 Luck.	28 N. L. R. 15 N L J 1932 Cr C 7 Luck.	29 N. L. R. 16 N L J 1933 Cr C 8 Luck.	30 N. L. R. 17 N L J 1934 Cr C 9 Luck
4 O W N 1 L C 6 Pat.	6 O W N 8 Pat.	7 O W N 9 Pat.	8 O W N 10 Pat.	9 O W N 11 Pat.	10 O W N 12 Pat.	11 O W N 13 Pat.
8 P L T 5 Rang. 6 Bur L J 20 & 21 SLR	10 P L T 7 Rang 23 S. L. R.	11 P L T 8 Rang 24 S. L. R.	12 P L T 9 Rang 25 S. L. R	13 P L T 10 Rang 26 S. L. R.	14 P L T 11 Rang 27 S L. R.	15 . P L T 12 Rang. 82 S. L. R.

THE
ALL INDIA REPORTER

1927

DONATED
BY
SHR. AMAR NATH RAINA
(1910-1930)
*Former Advocate General,
Jammu and Kashmir.*

JOURNAL SECTION

CONTAINING
SHORT NOTES AND COMMENTS, ORIGINAL ARTICLES,
CRITICAL NOTES, REVIEWS OF BOOKS, ETC.

CITATION : A. I. R. 1927 JOURNAL

PRINTED AND PUBLISHED BY
V. V. CHITALEY, B.A., LL.B.,
AT THE "ALL INDIA REPORTER" PRESS,
NAGPUR, C. P.

1927

All Rights Reserved)

- Chancellor—Young for Lord 53 M L J 162
- Chancellor and the Lords 29 Bom. L R 159
- Chancellor and the Lords 53 M L J 95
- Chancellor and the Lords 1927 MWN 83
- Chancellor's, Lord, Double role 29 Bom. L R 158
- Chancellor's, Lord, Double Role 53 M L J 95
- Chancellor's, Lord, Double role 1927 M W N 83
- Chancery Division—Sepcial Fees 52 M L J 44
- Chancery Division — Unlucky "Devils" 52 M L J 89
- Chancery Leaders 52 M L J 43
- Chancery Leaders 52 M L J 48
- Chatterjee, late Mr. Haraprosad 46 C L J 32
- Chatterjea, Sir Nalini Ranjan 31 C W N 17
- China—Constitutional reform in 31 C W N 69
- China's claim for abolition of ex-territoriality 31 C W N 65
- Chinese Draft Constitution, 1923 31 C W N 69
- Chinese Legal Reform 31 C W N 65
- Civil P. C, S. 11—Adverse finding against successful party in a previous suit does not act as res judicata—8 Lah. 537 (P.C.) discussed 53 M L J (n.i.c.) 58
- S. 11—Cross suits disposed by one judgment—Only one appeal—Whether decree in other suit acts as res judicata : 8 Lah. 384 (F.B.) discussed 53 M L J (n.i.c.) 57
- S. 11—Estoppel against estoppel 49 All. 606 discussed 53 M L J (n.i.c.) 44
- S. 13—Foreign decree of nullity 29 Bom. L R 117
- S. 13—Foreign judgment obtained ex-parte whether cannot be sued against : 50 Mad. 261 (F. B.) discussed 53 M L J (n.i.c.) 21
- S. 13—Whether a suit lies on an exparte foreign judgment—50 Mad. 261 (F. B.) discussed 39 M L T 39
- S. 20 Cl. (c)—Whether the Court where creditor resides has always jurisdiction—5 Rang. 451 (P. C.) discussed 53 M L J (n.i.c.) 52
- S. 34 and O. 34, R. 2—Interest in mortgage suits is to be determined under O. 34 and not S. 34 : 38 M. L. T. 73 (P.C.) discussed 38 M L T 25
- S. 47—Person made a party to mortgage suit but subsequently exonerated—Claim preferred by him in execution of the decree in mortgage suit but rejected—S. 47 is no bar to a suit by such person: 49 All. 379 disc. 53 M L J (n.i.c.) 31
- S. 47—Security bond for performance of a decree 54 Cal. 1 discussed 52 M L J (n.i.c.) 37
- S. 48—Whether death of decree-holder bars execution : 50 Mad. 1 discussed 52 M L J (n.i.c.) 29
- S. 48—Mortgage decree against person and property—Execution against person after 12 years is barred—50 Mad. 5 discussed 26 M L W 13
- S. 50—Decree can be passed personally if legal representative is in possession of assets : 49 All. 645 discussed 53 M L J (n.i.c.) 55
- S. 50—Right and obligations of legal representatives in execution proceedings A. I. R. J 17
- S. 73—Whether S. 73 applies to subsequent mortgagee to have his rights decided in a suit by prior mortgagee—49 All. 636 discussed 53 M L J (n.i.c.) 55
- S. 80—50 Mad. 239 discussed 53 M L J (n.i.c.) 21
- S. 100—Concurrent findings of fact—Whether can be challenged on ground of misinterpretation of English law 31 C W N 94
- S. 103—Amendment of ; by Act 6 of 1926 31 C W N 17
- S. 110—Substantial question of law, meaning of 31 C W N 103
- S. 110—Whether costs can be taken into account : 6 Pat. 445 discussed 53 M L J (n.i.c.) 40
- S. 112 and O. 45, R. 7—Whether High Court has discretion in extending time for furnishing security for costs : 51 Bom. 450 (F.B.) discussed 53 M L J (n.i.c.) 48
- S. 115—Decision in the absence of necessary parties is a material irregularity—54 Cal. 3.8 (P. C.) discussed 53 M L J (n.i.c.) 30
- S. 115—High Court's powers of interference : 1927 M. W. N. 84 (P. C.) discussed 1927 M. W. N. 51

Civil P. C.

- S. 141—Application to set aside sale dismissed for default — Whether applicant has any remedy 31 C W N 27, 32, 36, 42
- S. 145 — Security bond for performance of a decree: 54 Cal. 1 discussed 52 M L J (n i c) 37
- O. 1, R. 1—Action against an unknown person 4 O W N 23
- O. 1, R. 1—Bold attempt 4 O W N 23
- O. 1, R. 10—Limitation Act, S. 22—Difficulty in reconciling both —50 Mad 372 discussed 53 M L J (n i c) 32
- O. 3, R. 4—Acceptance of Vakalatnama in the mofussal 31 C W N 158
- O. 7, R. 1 — Action against an unknown person 52 M L J 46
- O. 7, R. 1 —Unknown defendant —A bold attempt 52 M L J 46
- O. 9 — O. 9 does not apply to execution proceedings : 50 Mad 67 discussed 52 M L J (n i c) 29
- O. 9—O. 9 does not apply to execution proceedings — 50 Mad. 67 discussed 26 L W 13
- O. 9, R. 8—Whether any number of applications can be made : 49 All. 592 discussed 53 M L J (n i c) 50
- O. 9, R. 13 : 51 Bom. 67 (F. B.) discussed 52 M L J (n i c) 20
- O. 9 and S. 151 — Whether inherent power can be used in orders under O. 9 : 54 Cal. 405 discussed 53 M L J (n i c) 47
- O. 17 — Absence of counsel on public duty a ground for adjournment (1927) M W N 60
- O. 18, R. 5—Evidence—Recording of, in appealable cases 31 C W N 125
- O. 18, R. 5—Evidence, recording of—New draft rules about 31 C W N 129
- O. 18, R. 5—Recording evidence by subordinate judiciary 31 C W N 126
- O. 21, R. 6 and O. 38 31 C W N 18
- O. 21, R. 16 — Rights and obligations of legal representatives in execution proceedings A. I. R. J. 17
- O. 21, Rr. 89--93—Whether auction purchaser can sue decree-holder for a refund of purchase-money in the absence of title : 53 Cal. 758 discussed 52 M L J (n i c) 18
- O. 21, R. 95 — Application for delivery of possession whether step-in-aid : 50 Mad. 403 discussed 53 M L J (n i c) 23
- O. 22—Decree-holder dying pending execution — Representatives cannot be substituted in his place in that petition — Fresh petition should be filed—50 Mad. 1 discussed 25 L W 32
- O. 22, R. 4—Preliminary mortgage-decree passed — Suit whether abates : 49 All. 310 discussed 53 M L J (n i c) 11
- O. 22, R. 10 — Whether applies to execution proceedings 31 C W N 14
- O. 22, R. 10—Whether applies to execution proceedings 31 C W N 115
- O. 33, R. 10 — Leave to appeal in forma pauperis — Special leave by Privy Council was refused 39 M L T 11
- O. 34 -- Preliminary and final decrees in mortgage suits 52 M L J 53
- O. 34, Rr. 1 and 4—Preliminary decree passed — Whether interest at contractual rate can be allowed —Correspondence 8 P L T 33
- O. 34, R. 5—Compromise decree —Provision for instalment but no date fixed — Application for final decree is not necessary : 49 All. 297 (F. B.) disc. 53 M L J (n i c) 10
- O. 37, R. 2—Suit on pro-note on original side — It must be in a summary suit form only : 49 Mad. 815 discussed 25 L W 30
- O. 38 and O. 21, R. 6: 31 C W N 18
- O. 38, R. 5 — Surety bond executed in trial Court—Bond covers also appellate order : 51 Bom. 31 discussed 52 M L J (n i c) 26
- O. 41, R. 33—Some parties not appealing — Common defence involved—Whole decree can be set aside : 48 All. 551 discussed 52 M L J (n i c) 3
- O. 47 — Review application granted—Whether whole case can be re-opened : A I R 1927 Cal 21 discussed 38 M L T 26
- O. 47, R. 2—Judge passing the order under review transferred to higher Court at the same place — Whether the application lies to the same Judge : 54 Cal 374 discussed 53 M L J (n i c) 37
- Sch. 2, para. 16 (2) : A I R 1924 Nag. 338, discussed A. I. R. J. 53, 61, 73 87

- Colonial Governors—Choice of
1927 M W N 54
- Constitutional law—Adjective law of
ancient India 45 C L J 33n
- British Commonwealth of Na-
tions 52 M L J 10
- Commonwealth of India Bill
25 L W 3
- Dominion Governors, position of
52 M L J 11
- Governor's power of dissolution
in Dominions 31 C W N 66
- Growing encroachment on judi-
ciary by the Executive 31 C W N 157
- Imperial Conference, 1926 and
India's Political Status 31 C W N 113
- Indian constitution—Lord Lyt-
ton on the anomalies of
31 C W N 101
- Judiciary and the Executive
53 M L J 68
- Judge's warning 39 M L T 45
- Judiciary and the Executive
39 M L T 45
- New declaration and the old
52 M L J 69, 70
- Rights of the subject — Legis-
lature trenching upon, without due
process of law 31 C W N 145
- Soviet theory of State
31 C W N 134
- Status of dominions within
British Commonwealth 31 C W N 21
- The Judge's Warning 53 M L J 69
- Contempt—High Court can punish
for attacks on inferior Courts : 48
All. 711 (F. B.) discussed
52 M L J (n i c) 14
- Contract—Executed and executory
29 Bom. L R 97
- Assignment of 31 C W N 4
- Contract Act, S. 23 — Immoral ag-
reement 29 Bom L R 71
- S. 23—Knock-Outs 29 Bom L R 34
- S. 68 — Personal covenant by
guardian without charging minor's
estate — Whether minor's estate
can be proceeded against : 49 All.
52 discussed 52 M L J (n i c) 42
- S. 72 — Recovery of money paid
by mistake 29 Bom. L R 116
- S. 73—Whether vendee can re-
cover interest on advance : 50
Mad. 94 (F. B.) discussed
52 M L J (n i c) 31
- S. 76—Sale of a ship
29 Bom. L R 54
- S. 78—Sale of undivided share,
e. g., half a rabbit 29 Bom. L R 11
- Contract Act
—S. 233—Election to sue princi-
pal or agent 1927 M W N 21, 23
- S. 239 — Person getting fixed
sum " in lieu of his share of pro-
fits " whether is a partner : 51
Bom. 342 discussed
53 M L J (n i c) 47
- S. 249—Agreement by incoming
partner to assume liability for past
transactions—Creditor cannot en-
force : 49 Mad 930 discussed
52 M L J (n i c) 23
- S. 253—Nature of ownership of
partnership property 31 C W N 41
- S. 264 — Public notice given—
Whether individual notice is dis-
pensed with — 29 Bom. L R 1244
discussed 39 M L T 31
- Coroner—Suicides and inquests " in
camera " 29 Bom. L R 92
- Suicides and inquests " in
camera " 4 O W N 37
- Cosharers — Alienation by cosharer
cannot affect other's rights of pos-
session: 53 Cal 694 (F.B.) discussed
52 M L J (n i c) 17
- Costello, Mr. Justice Leonard Wilfred
James—Our new Judge 45 C L J 27n
- Costello, Mr. Justice : L. W. J.
31 C W N 73
- Court—Mr. Justice Eve on Publicity
29 Bom. L R 114
- Court-fess—Reduction of 38 M L T 21
- Court-fees Act, S. 7, Cl. (9)—Suit
for redemption—What is the
value for jurisdiction : 7 Lah. 570
(F.B.) discussed 52 M L J (n i c) 21
- S. 10—Suit undervalued and
filed in inferior Court—Court
should not dismiss the suit, but
should return the plaint : 51 Bom.
236 discussed 53 M L J (n i c) 14
- S. 12—Insufficient Court-fee on
appeal—Appeal must be regis-
tered first before asking deficit fee:
31 C. W. N. 1045 discussed
39 M L T 27
- Crime—Increase of 52 M L J 14
- Increase of 4 O W N 12
- Remedy for 52 M L J 14
- Criminal, psychology of the
28 Cr L J 63
- Criminal appeals 53 M L J 159
- Trial by Bench—Guntur case,
and after 38 M L T 18
- Criminal Court of equity 28 Cr L J 41
- Criminal law—Immunity of Judges
under 25 A L J 1

- Criminal P. C., Ss. 102, 103—Applicability to searches under Excise Act 31 C W N 138
- S. 107—Recalling of witnesses for cross-examination in bad livelihood cases 31 C W N 178
- S. 109—Suspected person—Security for good behaviour from 31 C W N 150
- S. 110—Proceedings for bad livelihood against persons registered under Criminal Tribes Act 31 C W N 34
- S. 161 and Evidence Act, S. 33 31 C W N 189
- Ss. 195 and 476 29 Bom L R 41
- S. 239 (f)—Whether several receivers of stolen property can be tried jointly : 6 Pat. 583 discussed 53 M L J (n i c) 53
- S. 247—Trial of summons cases 31 C W N 54
- S. 255—Refusal to plead 52 M L J 48
- S. 256—Recalling of witnesses in bad livelihood cases 31 C W N 178
- S. 256—Refusal to plead 4 O W N 29
- Ss. 262 and 264—Anomaly in procedural law governing the summary trial of warrant cases 31 C W N 90
- S. 276, Prov. (2)—Seven jury appeals 31 C W N 193
- S. 297—Misdirection of jury on facts—Negligence in criminal Courts 28 Cr. L J 44
- S. 310—Date of previous conviction to prove criminal intent 28 Cr L J 44
- S. 340—Vakalatnama in criminal cases 31 C W N 186, 187
- S. 342—Examination of accused persons—Views of several High Courts 8 P L T 47
- S. 360—Interpretation of Judicial Committee 31 C W N 61
- S. 371 31 C W N 111
- S. 403—*Nemo bis vexari debet* 29 Bom L R 35
- S. 403—*Nemo bis vexari debet* 4 O W N 19
- S. 403—*Nemo bis vexari debet* 38 M L T 20
- S. 423—Tennessee Trial 52 M L J 65
- S. 439 (4)—Power to alter finding and enhance sentence—8 Lah 136 discussed 53 M L J (n i c) 3
- Criminal P. C.
- S. 439 (4)—50 Mad. 259 discussed 31 C W N 165
- S. 476-B—Appeals under 31 C W N 78
- S. 488—Is "opposite party" an "accused person" A. I. R. J. 10
- S. 491—Habeas corpus 31 C W N 104
- S. 491—Habeas corpus 31 C W N 110
- S. 491—Writ of Habeas Corpus 31 C W N 122
- S. 496—Refusing fingerprints as reason for no bail 28 Cr L J 32
- S. 497—Offence nonbailable—Whether Magistrates can grant bail : 5 Rang 276 (F. B.) discussed 53 M L J (n i c) 35
- S. 526—Whether transfer application can be made directly to High Court : 27 Cr L J 40 discussed 28 Cr L J 11
- S. 526, Cl. 8—Adjournments under A. I. R. J. 23
- S. 526 (8) — Adjournments under A. I. R. J. 5
- S. 544—Cognizable case—Whether Government bound to pay fees for defence witnesses 8 P L T 71
- S. 556—Possibility of bias 29 Bom. L R 113
- S. 556—Sessions Judge preferring complaint under S. 476 cannot try the same case in appeal : 8 Lah 496 discussed 53 M L J (n i c) 57
- S. 562—28 Bom. L R 1031 discussed 1927 M W N 24
- Criminal trial—Alibi, return of 28 Cr L J 90
- Committing Magistrate as a witness at the trial 28 Cr L J 79
- Capital punishment 28 Cr L J 58
- Deterrent sentences 28 Cr L J 81
- Deterrent sentences 53 M L J 66
- Deterrent sentences 39 M L T 26
- Deterrent sentences 4 O W N 55
- Dishonour among thieves 4 O W N 80
- Doubtful leniency 52 M L J 88
- Family and state in criminal jurisprudence 53 M L J 66
- Jury trial an ineffective survival 28 Cr L J 17
- Killing in mercy 53 M L J 159
- Medical evidence—More trouble for the prosecution 28 Cr L J 80
- Reduction of sentence 53 M L J 160
- Sacco and Vanzetti case 1927 M W N 88, 89

- Criminal trial
 —Savage sentences 28 Cr L J 66
 —Trial of corporations 28 Cr L J 62
 —Unsatisfactory character of records in criminal cases 31 C W N 134
 —“Unwritten law” 4 O W N 40
 —Vakalatnama in criminal cases 31 C W N 186, 187
 —Vakalats and criminal Courts 53 M L J 116
 Crown as litigant 53 M L J 25
 —The Scottish model 53 M L J 26
 Davies, Justice—Reminiscences of a Lawyer 1927 M W N 45
 Decree—Setting aside for fraud—Fraud must prevent plaintiff from putting his case: 5 Rang. 46 discussed 52 M L J (n i c) 35
 Deed—Construction — Rule in Shelley's case 1927 M W N 53
 Dictionary, Oxford English 29 B L R 137
 Dillon, Late Mr. G. W.—Tribute in High Court 25 A L J 10
 Divorce—The woman in the Case 39 M L T 3
 Divorce Act—Indian and Colonial Divorce Jurisdiction Act 1927 M W N 26
 —Judicial intervention in divorce suits 4 O W N 11
 Divorce suits—Judicial intervention in 52 M L J 9
 Easement—Person claiming right of ownership cannot acquire the right of easement: 49 Mad. 820 (F. B.) discussed 25 L W 31
 Elections—Forthcoming General 31 C W N 2
 Emergency regulations—Repeal of repressive laws 31 C W N 25
 Execution sale—Setting aside revenue sales. 6 Pat. 200 (P. C.) discussed 52 M L J (n i c) 46
 Expert—Evidentiary value of fingerprints 38 M L T 27
 Extradition Act—Political crime: the Right of Asylum 29 Bom. L R 11
 Evidence, circumstantial evidence in a murder case A. I. R. J 25
 —Medical practitioner—Duty in cases of crime 29 Bom. L R 138
 —Medical Practitioner — Should a doctor tell 29 Bom. L R 137
 —Admissibility of—Preliminary questions of fact in determining the same 31 C W N 95
 —Appreciation — Morals and policemen 28 Cr L J 89
 Evidence
 —Dictaphone record—Admissibility of 39 M L T 3
 Evidence Act—Aspects of law of evidence relating to art of advocacy 29 Bom. L R 17
 —S. 15 — Obtaining credit by fraud—Evidence of similar transactions 29 Bom. L R 115
 —S. 15—Obtaining credit by fraud—Evidence of similar transactions 28 Cr L J 80
 —S. 15—Evidence of similar acts 28 Cr L J 61
 —S. 33 and Criminal P. C., S. 161 31 C W N 189
 —S. 45—Compensation of expert witnesses 28 Cr L J 13
 —S. 45 — Identity and fingerprints 53 M L J 23
 —S. 45—Identity and fingerprints 4 O W N 39
 —S. 45—Evidence of handwriting expert 4 O W N 6
 —S. 54—Date of previous conviction to prove criminal intent 28 Cr L J 44
 —S. 60—Tracking by dogs 28 Cr L J 31
 —S. 63—Secondary oral evidence must be of a person who has read the document: 5 Rang. 18 (P. C.) discussed 52 M L J (n i c) 34
 —S. 68—Proof of attested deeds 8 P L T 6
 —S. 90—Presumption under: 49 All. 55, discussed 52 M L J (n i c) 42
 —S. 92—Subsequent conduct of parties is admissible to explain a contract open to different meanings: 5 Rang. 175 (P. C.) discussed 53 M L J (n i c) 26
 —S. 101—Onus, true scope of 31 C W N 94
 —S. 112—Applicability to Mahomedans: 48 All. 625 discussed 52 M L J (n i c) 14
 —S. 115—Pre-emption—Vendee taking out money deposited whether estopped: 48 All. 616 discussed 52 M L J (n i c) 8
 —S. 154—Hostile witnesses 28 Cr L J 7
 —S. 159—Dictaphone and telegraph in evidence 29 Bom. L. R. 75
 Football match 8 P L T 59
 Foster, late Mr. Justice 8 P L T 1
 Gambling—Ethics of the problem 53 M L J 162

- Government of India Act—Corporate responsibility of Ministers
1927 M W N 18
- Mr. S. Srinivasa Iyengar the Lawyer—Leader—Patriot on the Reforms Act 1927 M W N 4
- S. 84-A—Statutory Commission 1927 M W N 103
- S. 101 — Memorandum by Madras High Court Vakils Association—Re-amendment of 1927 M W N 33
- S. 101—Vakils as Chief Justices 8 P L T 21
- Greaves, Sir William Ewart, Kt. 46 C L J 11
- Guardians and Wards Act, S. 29—Alienee can rely on the sanction: 50 Mad. 217 disc. 53 M L J (n i c) 18
- High Way—Motor hooting 29 Bom. L R 161
- Motor hooting 4 O W N 79
- Right of the road 29 Bom. L R 93
- Right of the road 4 O W N 35
- Traffic control and safety 29 Bom. L R 91
- Hindu-Muslim Disputes Prevention (Proposed) Bill in C. P. Council 10 N L J 14
- Hindu Law—Adoption—Validity of a conditional adoption: *Krishnamurthi v. Krishnamurthi* discussed 31 C W N 169
- Adoption—Ante-adoption agreement, validity of: 50 Mad. 508 (P. C.) discussed 26 M L W 39
- Adoption by widow under Bombay school: 50 Bom. 468 (F. B.) discussed 52 M L J (n i c) 5
- Adoption in Dattaka form not obsolete in Mithila: 5 Pat. 777 discussed 52 M L J (n i c) 9
- Adoption—Swayamdatta form—Custom how to be proved: 49 All. 302 discussed 53 M L J (n i c) 11
- Adoption — Arrangement with natural father prior to adoption how far binding: 50 Mad. 508 discussed 53 M L J (n i c) 15
- Adoption — Ante-adoption agreement: 50 Mad. 508 (P. C.) discussed 39 M L T 11
- Adoption by widow—Consent of husband: 49 Mad. 969 discussed 52 M L J (n i c) 24
- Alienation — Father — Antecedent debt—A mortgage renewed in favour of same mortgagee whether antecedent: 49 All. 123 (F. B.) discussed 52 M L J (n i c) 43
- Alienation — Necessity proved for greater portion of the consideration:—Sale is valid: 49 All. 149 (P. C.) discussed 52 M L J (n i c) 44
- Alienation — Manager — Whether shebait can alienate debutter properties: 6 Pat. 139 (P. C.) discussed 52 M L J (n i c) 45
- Alienation—Manager can endow small portion for religious charity without consent of other members: 50 Mad. 421 (P. C.) discussed 53 M L J (n i c) 4
- Alienation—Manager—Legality of: 8 Lah. 597 (P. C.) discussed 53 M L J (n i c) 59
- Alienation by father—Junior members also made parties to the suit for specific performance and in the alternative for damages—Decree for return of earnest money held not sustainable against junior members: 6 Pat. 323 (P. C.) discussed 53 M L J (n i c) 25
- Alienation by manager: 48 All. 592 discussed 52 M L J (n i c) 13
- Applicability—Whether Kayasthas of Bihar are Kshatriyas or Shudras: 6 Pat. 506 discussed 53 M L J (n i c) 54
- Impartible estate — Zamindari whether coparcenary property: 39 M L T 1 (P. C.) disc. 39 M L T 19
- Interpretation — Equitable interpretation by Judicial Committee 31 C W N 30
- Marriage—Restitution of conjugal rights—Defences open in a suit for: 51 Bom. 329 discussed 53 M L J (n i c) 29
- Religious endowment—Mutt—Effect of decree against mathadhipathi: 50 Mad. 497 (P. C.) discussed 53 M L J (n i c) 19
- Religious endowment — Mutt whether liable to pay mathadhipathi's debts: 50 Mad. 497 (P. C.) discussed 39 M L T 20
- Research and Reform Association A. I. R. J 46
- Succession — Disqualifications for: 51 Bom. 50 discussed 52 M L J (n i c) 28
- Succession — Stridhan—Whether daughter's daughter has preference to daughter's son: 48

- All. 648 discussed 52 M L J (n.i.c.) 13
- Widow—Effect of surrender explained : 49 All. 334 discussed 53 M. L. J. (n.i.c.) 12
- Widow—Surrender by 29 Bom. L R 121
- Hindu Religious Endowments Board
- An anachronism 1927 M W N 74
- Husband and wife—Divorce proceedings — Parties to, living under same roof 29 Bom. L R 73
- Guilty wife and alimony 29 Bom. L R 52
- Husband's lost domain 53 M L J 165
- Husband's lost right to chastise 53 M L J 129
- Marriage without consent 29 Bom. L R 70
- Marriage without consent 52 M L J 90
- Identification of Prisoners Act — Identity and fingerprints 28 Cr. L J 62
- Identification of prisoners Act — Identification by photograph 28 Cr. L J 53
- Income-tax and law books 52 M L J 10
- Income-tax Act — Joint family income and aggregate sum of the members A.I.R. J. 26
- S. 33—Whether Income-tax Commissioner can call for the record of any proceedings and can pass orders thereon : 8 Lah. 347 and 354 discussed 53 M L J (n.i.c.) 41
- Whether deduction can be made for law books 4 O W N 11
- Innkeepers, modern—Liability of 29 Bom. L R 115
- Insolvent debtors, relief of : A.I.R. J. 2
- Insurance and litigation 52 M L J 47
- and litigation 4 O W N 31
- Insured motor-driver 28 Cr. L J 65
- History of : 45 C L J 41n ; 55n ; 67n
- History of 46 C L J 1
- Interest—Bill to restrict the amount recoverable suggested by Mr. D. W. Kathalay 10 N L J 6
- International law—Recent legislation in United Kingdom 31 C W N 153
- Plans for universal peace 52 M L J 86
- Disarmament 52 M L J 12
- Interpretation of statutes — Fundamental law 31 C W N 37
- Prosecution under statute not in force 28 Cr. L J 50
- Interpretation of Statutes
- Judge — Whether is person a designate : 50 Mad. 121 discussed 52 M L J (n.i.c.) 31
- Bye-Law made under statutory powers — They are not immune from control of Courts : 5 Rang. 212 discussed 53 M L J (n.i.c.) 27
- Jackson, Justice, in the Admission Court 1927 M W N 93
- Jail Committee — Recommendations of 31 C W N 137
- James, Mr. Justice 8 P L T 35
- Judge—Law v. Judicial discretion, criticism of A.I.R. J. 56, 63, 81
- Law v. Judicial discretion A.I.R. J 29
- Law, Advocate and Judge 29 Bom. L R 103
- The law and the advocate 28 Cr L J 67
- Pay of Lord Justice of Appeal 53 M L J 130
- Right of clearing the Bar 39 M L T 25
- The Law and the Advocate : by Mr. Justice M. Cardie 1927 M W N 105
- Style of the L. C. J. 4 O W N 73
- Possibility of bias 4 O W N 58
- The Law and the Advocate 4 O W N 43
- Writing of judgment 4 O W N 1
- Dist. Judges and supervision of Subordinate Judges 31 C W N 161
- King's Bench vacancies 53 M L J 96
- Without Silk 52 M L J 89
- How unmake the law 52 M L J 88
- Clearing the Court 53 M L J 26
- Irish 52 M L J 15
- Chief Justice, permanent appointment of High Court vakils— Debate in Council of State 1927 M W N 49
- Immunity of, under criminal law 25 A L J 1
- Tests for 1927 M W N 36
- "Trials" in the Court of Sessions 29 Bom. L R 68
- "Trials" in the Court of Session 4 O W N 40
- Judicial Committee of the Privy Council and unity of law in the Empire—Rhodes lectures on, by Prof. G. H. Morgan 25 A L J 25, 33, 41, 49, 57
- Viscount Haldane on 31 C W N 177
- Crown and the Colonies—Rhodes's lecture 31 C W N 117

- Judicial Committee
 —Rhodes lectures on 31 C W N 113
 —Boundary disputes between Dominions 31 C W N 109
 —Members of Indian experience 31 C W N 102
 —Bill 31 C W N 26
 —Lord Haldane on 53 M L J 90
 —and Imperial Conference 52 M L J 12
 —Bill 1927 M W N 27
 —and India 31 C W N 9
- Judicial Humour and Mr. Taft 1927 M W N 14
 — 4 O W N 2
- Judicial officer—Clearing the Court 28 Cr. L J 64
 —Exclusion of public on hearing interlocutory summons 28 Cr L J 63
 —Writing of judgments 1927 M W N 14
 —Advice to 29 Bom. L R 86
 —Civil—Provision for more 31 C W N 129
- Judicial proceedings—Law will not regard fractions of a day 28 Cr L J 56
 —Science in the Court-room 28 Cr L J 27
- Juries; value of 53 M L J 128
- Jurisprudence of the Fascists 29 Bom. L R 74
 —Plurality of sovereignty 29 Bom. L R 74
- Jury—Trial by 28 Cr L J 79
- Justice and Bureaucracy—Lord Hewart on Bureaucratic Absolutism 29 Bom. L R 31
- Justice, The New Lord 53 M L J 157
- K. Sundaram Chettiar, Diwan Bahadur, District Judge, South Arcot—Parting Speech of 26 M L W 11
- Knight, late Mr. Hugh 31 C W N 10
- Knock-outs 38 M L T 23
- Krishnan, Sir C.—Late Justice 52 M L J 21
 —Late Justice Sir C. 38 M L T 7
 —Late Hon'ble Justice 25 L W (i)
 —Late Sir, 1927 M W N 31
 —Sir C. 1927 M W N 9
- Landlord and tenant—Obligation of landlord to repair 29 Bom. L R 53
- Law—Advocate & Judge 29 Bom. LR 103
 —The Advocate and the Judge 28 Cr L J 67
 —The Advocate and the Judge by Mr. Justice McCardie 1927 M W N 105
 —The Advocate and the Judge 4 O W N 43
- Law
 —Legal Humourists 29 Bom. L R 72
 —Lord Birkenhead on 53 M L J 128
 —As a profession, Lord Chancellor on 31 C W N 25
 —Reading of 28 Cr L J 57
 —Witchcraft & law 29 Bom. L R 136
 —and bureaucracy 29 Bom. L R 52
 —Lord Hewart on Bureaucratic Absolutism 29 Bom. L R 31
 —Advance of Bureaucracy 52 M L J 45
 —Bureaucratic Absolutism, Lord Hewart on 52 M L J 17
 —Officers and the glittering prizes 53 M L J 126
- Law reporting—English Reports 53 M L J 101
 —English Reports 53 M L J 33
- Law reviewing—American critic on 29 Bom. L R 140
 —American critic on 4 O W N 63
- Law Society's meeting, Liverpool 52 M L J 13
- Lawyer's Conference—Law Member's advice 1927 M W N 16
- Legal practitioner—Solicitor and client 29 Bom. L R 139
- Law, Advocate and Judge 29 Bom. L R 103
- Pleaders in ancient Hindu law 45 C L J 19n
- Suspension of the recent High Court rules about enrolment of pleaders 31 C W N 137
- Authority and privilege of counsel in respect of conducting suit 31 C W N 93
- New High Court rules regarding service under Articles of Clerkships 31 C W N 46
- New rules for admission of pleaders 31 C W N 45
- The lawyer's place in the Commonwealth 28 Cr L J 75
- The Law, the Advocate and the Judge 28 Cr L J 67
- Evidence by counsel 28 Cr L J 66
- Unauthorized compromises 28 Cr L J 65
- Authority of counsel 28 Cr L J 65
- Counsel and witnesses 28 Cr L J 58
- American Code of Professional Ethics 28 Cr L J 45
- The moanings of the Bar 28 Cr L J 42
- Question of etiquette 53 M L J 157
- Death of Sergeant Buz Buz 53 M L J 156

- Legal practitioner
 —Vakalats and criminal Courts! 53 M L J 116
 —Good Lawyer and the Bad Cause 53 M L J 67
 —Evidence by counsel 52 M L J 67
 —Unauthorized compromise 52 M L J 67
 —Authority of counsel 52 M L J 66
 —Clearing the Bar 53 M L J 65
 —The Improving Lawyer 53 M L J 24
 —An ancient friendship 38 M L T 22
 —A Solicitor & a Client 39 M L T 4
 —Profession, party opposite and the public 25 L. W 19, 43
 —Age and efficiency 1927 M W N 106
 —The Law, the Advocate and the Judge by Mr. Justice McCardie 1927 M W N 105
 —Vakil's Association — Its language 1927 M W N 15
 —Good Lawyer and the Bad Cause 4 O W N 55
 —The Law, the Advocate and the Judge 4 O W N 43
 —Improving lawyer 4 O W N 42
 —Lawyer's duty 8 P L T 11
 —An ancient friendship 29 Bom. L R 33
 —Chancery leaders 29 Bom. L R 32
 —More engagements than a lawyer can attend 31 C W N 170
 Legislation—1927 Acts A. I. R. J 45, 69
 —in 1926 A. I. R. J 40
 —by Regulations 53 M L J 161
 —by Rules 52 M L J 45
 Legislative Assembly—Attendance of Mr. S. C. Mitra, the Bengal detainee 1927 M W N 37
 Legislative changes 46 C L J 15, 25
 —Comparative Journal of 31 C W N 53
 Legislative Council — Resolutions submitted by members, if may be amended by the President 31 C W N 74
 —Rights of interpellation and the President's duty 31 C W N 73
 —(Madras)—Presidentship of 1927 M W N 28
 Limitation Act Amendment Bill suggested by Mr. D. W. Kathalay 10 N L R 8
 —S. 15 — Execution application filed three years after previous application on account of an injunction—Application whether barred: 49 All. 276 (F B) discussed 53 M L J (n. i. c.) 1
 —S 19 — Whether period prescribed under S. 31 is period within S. 19. 49 All. 67 discussed 52 M L J (n. i. c.) 42
 —S. 20—Payment of interest by purchaser of equity of redemption saves limitation even against mortgagor—54 Cal. 179 discussed 53 M L J (n.i.c.) 13
 —S. 22—Civil P. C., O. 1, R. 10—Difficulty in reconciling both: 50 Mad.372 discussed 33 M L J (n.i.c.) 32
 —Art. 66 and 132—Personal liability of mortgagor 31 C W N 67
 —Art. 66—Mortgagor's personal liability 31 C W N 65
 —Art. 109—Suit for mesne profits must be brought within three years from receipt thereof : 49 All. 565 discussed 53 M L J (n.i.c.) 43
 —Art. 112—Suit by a liquidator for unpaid calls 29 Bom. L R 57
 —Art. 116—Personal liability of mortgagor—Whether Art. 116 or Art. 66 applies : 7 P. L. T. 501 discussed 8 P L T 61
 —Art. 132 — *Pancham v. Auser Husain* discussed 31 C W N 70
 —Art. 144—Watan property and adverse possession 29 Bom. L R 81
 —Art. 164—Art. 164 and setting aside ex-parte decree 26 L W 15
 —Art. 182 (5)—Objection by decree-holder to judgment-debtor's application is not a step-in-aid: 50 Mad. 49 discussed 52 M L J (n.i.c.) 30
 —Art. 182 (5)—Execution application returned for amendment—Application is within Art. 182: 53 Cal. 664 discussed 52 M L J (n.i.c.) 1
 Litigant—"Brick House" and the Lay Litigant 29 Bom. L R 37
 Lords and the Chancellor 53 M L J 95
 —House of—When H. L was abolished 53 M L J 94
 —Appellate jurisdiction of 53 MLJ 93
 —House of—Reforms of 1927 M W N 78
 Machiavelli—Note on 53 M L J 70
 Macleod, Sir Norman—Unveiling of portrait 29 Bom. L R 153
 Macpherson, Mr. Justice 8 P L T 9
 Madavan Nair, Hon'ble Mr. Justice 38 M L T 17
 Madhavan Nair, Mr. Justice 1927 M W N 32
 Madras District Municipalities Act —Taxes and tolls on vehicles 1927 M W N 107

- Madras Estates Land Act 52 M L J 73
 —Ss. 8 and 185—Land originally
 can be shown to be private at the
 date of suit : 50 Mad. 201 discussed
 53 M L J (n.i.c.) 17
- Madras High Court Rules—New rule
 regarding special motions
 1927 M W N 99
- Translation and printing rules
 1927 M W N 43
- Madras Hindu Religious Endowments
 Act (2 of 1927) 1927 M W N 95
- Madras Local Boards Act—Law of
 Encroachments on Local Board's
 Land and Highways : 1927 M. W.
 N. 645 discussed 1927 M W N 77
- Law of Encroachments on Local
 Board's Land and Highways
 1927 M W N 67
- Magna Carta and the Barons
 31 C W N 34
- Mahomedan Law — Legitimacy: 48
 All. 625 discussed 52 M L J (n.i.c.) 14
- Wakf—Shiah law—Transfer of
 possession is necessary : 6 Pat. 259
 (P. C.) discussed 53 M L J (n.i.c.) 9
- Majumdar, Mr. Justice Ram Chandra
 45 C L J 29n
- Majumdar, Mr. Justice Ram Chandra
 31 C W N 77
- Malabar Tenancy Legislation
 1927 M W N 86
- Married women—Law and the sex
 28 Cr L J 89
- Master and servant—Tortious Acts
 of servant—Master's liability for
 29 Bom. L R 90
- Medical Practitioner—Medical privi-
 lege and public interest 31 C W N 186
- Medical privilege and public
 duty 31 C W N 173
- Physician's inroads into legal
 profession 31 C W N 170
- Should a Doctor tell 28 Cr. L J 81
- Duty in cases of crime 28 Cr. L J 81
- What is professional negligence
 28 Cr. L J 43
- Doctor must tell 53 M L J 93
- Legal basis of medical fees
 52 M L J 49
- The Doctor must tell 4 O W N 73
- Duty in cases of crime 4 O W N 64
- Legal basis for Medical Fees
 4 O W N 30
- Mesne profits—Suit for future mesne
 profits—Cause of action is not the
 same as possession : 49 All. 597
 discussed 53 M L J (n.i.c.) 44
- Mills — Pollution of rivers by
 affluents from 31 C W N 193
- Minor — Liability under contract
 entered into on fraudulent repre-
 sentation that he was of age—6
 Pat. 388 discussed 53 M L J (n.i.c.) 34
- Agreement by: consequences of—
 Innocent party when compensated
 29 Bom. L R 145
- Mitter, Mr. Justice Dwarka Nath
 31 C W N 17
- Morley's, Lord, regret 4 O W N 21
- Mortgage — Prior and subsequent
 mortgagees : 48 All. 574 discussed
 52 M L J (n.i.c.) 3
- Motor Vehicles Act — Drunk, in
 charge 52 M L J 65
- Mullick, Justice Sir B. K. — Our
 Acting Chief Justice 8 P L T 31
- Native convert's marriage dissolution
 Amendment Bill suggested by Mr.
 D. W. Kathalay 10 N L J 5
- Negotiable Instruments Act —
 Chequelets 29 Bom. L R 161
- A bank customer and his pass-
 book 29 Bom. L R 113
- Who is bank's customer
 29 Bom. L R 69
- News papers—Publication of photo-
 graph of an under-trial prisoner,
 if contempt of Court 31 C W N 89
- Norton, Mr. Eardley—Portrait of
 38 M L T 44
- Norton, Memorial to Mr. Eardley
 25 L W 59
- Oath—Kissing the Book 53 M L J 94
- Oaths Act — S. 8—Special oaths
 31 C W N 189
- S. 9—Oath may be retracted :
 49 All. 388 discussed
 53 M L J (n i c) 32
- Kissing the Book 4 O W N 74
- Pargiter, Mr. F. E., Ex. Puisne
 Judge, Calcutta 52 M L J 68
- Parker, Justice—Reminiscences of a
 Lawyer 1927 M W N 45
- Parthasarathy Iyengar, late Mr.
 M. O. 1927 M W N 9
- Penal Code, S. 79—Killing a ghost :
 See A. I. R. 1926 Lah. 54. 28 Cr L J 32
- S. 84—Feeble-minded offenders
 28 Cr L J 88
- Ss. 84 and 85 — Tests for
 drunkenness 28 Cr L J 51
- S. 84—Sleeping sickness as an
 excuse for a crime 28 Cr L J 42
- Ss. 84, 85 — Reconciliation of
 the legal and psychiatric view-
 points of delinquency 28 Cr L J 1
- S. 193 — Relation of oath or
 affirmation to the offence under
 53 M L J 46

Penal Code

- S. 295-A—Scurrilous Writings Bill 1927 M W N 91
- S. 299—Law relating to homicide in the I. P. C. 25 A L J 17
- S. 300—Circumstantial evidence in a murder case A I R J 25
- S. 300—"Unwritten law" 29 Bom L R 68
- S. 300—Life sentences 52 M L J 69
- S. 304—Manslaughter by motorists 28 Cr L J 51
- S. 499 — Whether "absolute privilege" is good defence : 6 Pat. 224 discussed 52 M L J (n i c) 47
- S. 499—Defaming a newspaper is an offence: 4 Rang. 462 discussed 52 M L J (n i c) 12
- S. 510 — Liability for being drunk in one's own house 4 O W N 3
- S. 511—Attempt 28 Cr L J 33
- Pleadings — Surrejoinder, rebutter and surrebutter 53 M L J 161
- Police Administration Report 1927 M W N 35
- Policeman, tipping of 39 M L T 4
- Practice—New plea — Raising new questions in appeal 28 Cr L J 74
- A rule is a rule 39 M L T 4
- Precedent—From precedent to precedent 28 Cr L J 54
- Judicial obiter dicta 53 M L J 24
- Judicial obiter dicta 4 O W N 42
- Value of obiter dicta 4 O W N 5
- Pre-emption — Vendee taking out money deposited by pre-emptor—Whether vendee estopped : 48 All. 616 discussed 52 M L J (n i c) 8
- Custom of, whether avails against sale by Official Assignee : 49 All. 367 (P. C.) discussed 53 M L J (n i c) 2
- Berar Land Rev. Code, Ch. 17 : 10 N L J 94 discussed 10 N L J 9
- Principal and agent — Agency of necessity 29 Bom L R 135
- Prison reform and probation of offenders, Home Secretary on 31 C W N 33
- Privy Council — Special leave for pauper appeals 31 C W N 174
- Final Court of appeal from British Dominions and Dependencies 31 C W N 109
- Paper-books — Preparation of 31 C W N 85
- Printed record — Inclusion of unnecessary documents 31 C W N 77
- Indian appeals to 31 C W N 73
- Judicial Committee of 28 Cr L J 83

Privy Council

- Judicial Committee 28 Cr L J 78
- Judges, great 53 M L J 90
- Judicial Committee of, and Unity of Law in the Empire 38 M L J 23
- Records in Indian Appeals 1927 M W N 47
- Supreme Court for India 4 O W N 7
- Probate and Administration Act, S. 90(4)—Administrator not taking leave to mortgage : 51 Bom. 16 discussed 52 M L J (n i c) 25
- Procedure, errors of 31 C W N 162
- Promissory-pote—Recent changes in stamp law A I R J 10
- Note passed by manager, Hindu family — Whether decree can be passed against other members : 54 Cal. 380 discussed 53 M L J (n i c) 38
- Prov. Insol. Act — Administration of the law of insolvency in the mofussil 25 L W 35
- S. 4 — Position of purchaser from Official Receiver A I R J 37
- S. 5—Arrest of debtor before adjudication 31 C W N 8
- S. 6 (g)—"Suspended payment" explained : 49 All. 321 discussed 53 M L J (n i c) 12
- S. 9—Frauds in the way of working of the Act 1927 M W N 85
- S. 43—Failure to apply for discharge—Whether adjudication can be annulled: 49 Mad. 935 discussed 52 M L J (n i c) 23
- S. 53—Whether judgment can be revised by any other Court : 49 All. 71 discussed 52 M L J (n i c) 43
- Public Prosecutor—Necessity for a Director of Public Prosecutions 1927 M W N 58
- Railway Rates Tribunal 1927 M W N 72
- Railways Act — Responsibility of Ry. Co., for hand-luggage 29 Bom L R 159
- Ry. Co.'s responsibility for hand-luggage 4 O W N 77
- Ss. 72, 77—Liability of railway for loss of goods 29 Bom L R 128
- S. 77—Notice posted within six months, but received by railway authorities after six months was found sufficient : 6 Pat. 256 discussed 53 M L J (n i c) 9
- S. 108—Alarm signal can be used for protection of valuable property : 8 Lah. 196 discussed 53 M L J (n i c) 4

- Rankin, Sir George, welcome to 31 C W N 12
- Rankin, Sir George, C. J. 31 C W N 1
- Registration Act, S. 17—Agreement to sell—Proposed legislation and *Dayal Singh v. Inder Singh*: A. I. R. 1926 P. C. 94 31 C W N 47, 52
- S. 17—Agreement of sale unregistered—Admissibility in evidence 31 C W N 29
- S. 17—Amendment by Art. 2 of 1927 : 51 Bom. 231 and 247 discussed 53 M L J (n i c) 17
- S. 17—Agreement of sale acknowledging receipt of purchase money : 51 M. L. J. 788 (P. C.) discussed 52 M L J 1
- S. 17 (2) (xii) — Amended by Act 2 of 1927 : A. I. R. 1926 P. C. 94 nullified 31 C W N 126
- S. 34—Power-of-attorney given to execute a document—Whether attorney can present the deed : 28 Bom. L. R. 949 discussed 29 Bom L R 1
- S. 47 — Gift-deed executed—Subsequent adoption before registration—Gift is valid ; 50 Mad. 193 (P. C.) discussed 52 M L J (n i c) 40
- S. 82—Prosecution under—Whether permission under S. 83 necessary : 4 Rang. 437 discussed 52 M L J (n i c) 10
- S. 90—Lease deed by Government whether exempt from registration : 6 Pat. 446 discussed 53 M L J (n i c) 42
- Religious endowment—Family idol —Members of the family, whether can put an end : 54 Cal. 30 discussed 52 M L J (n i c) 41
- Revenue sale—Setting aside : 6 Pat. 200 (P. C.) discussed 52 M L J (n i c) 46
- Right of suit—Collusion and civil right : 10 N L J 64 discussed 10 N L J 18
- Rivers—Pollution of, by affluents from mills 31 C W N 193
- Sadasiva Aiyar, Late Sir—Reference in High Court 53 M L J 152
- Sadasiva Aiyar, late Dewan Bahadur Sir T. 26 L W 49
- Sanderson, Sir Lancelot, at Calcutta Dinner 31 C W N 149
- Sanderson, Sir Lancelot—Tribute to 31 C W N 12
- Sanderson, Sir Lancelot—Reference to, by Bar—Reply by Sir George Rankin 31 C W N 10
- Sanderson, Sir Lancelot's appointment to Judicial Committee 31 C W N 9
- Sanderson, Sir Lancelot, C. J. 31 C W N 1
- Sankaran Nair, Sir — Reminiscences of the Bench and Bar 1927 M W N 81
- Scroope, Mr. Justice 8 P L T 9
- Sen, Late Babu Paresh Chandra, Vakil 31 C W N 169
- Sen, Mr. Justice P. K. 8 P L T 31
- Secretary of State—A "Natural" and "Fictitious Person"—38 M L T 41
- Report 38 M L T 39
- Shah, Sir Lallubhai—Unveiling of Portrait 29 Bom L R 153
- Sind J C's. Criminal Circular A I R J 94
- Sinha, Lord—New honour for 31 C W N 85
- Specific performance—An agreement to sell chattels 29 Bom L R 33
- An agreement to sell chattels 38 M L T 22
- Stamp Act, S. 11—Description of stamps on pro-notes A I R J 40
- Art 33 (a)—Mortgagee to take possession in default of due payment of interest—Whether Art. 33 applies : 49 Mad. 403 discussed 52 M L J (n i c) 22
- Subramania Iyer, Sir, S—Reminiscences of a lawyer 1927 M W N 1
- Succession Act (1925), S. 370—Succession Certificate Act, 1889, S. 4—Is insurance money a debt : A I R J 14
- Subrawardy, Sir Zahid 31 C W N 137
- Swits Valuation Act, S. 11—Pecuniary jurisdiction, whether can be questioned in appeal 31 C W N 19
- Sultan Ahmad, Sir 8 P L T 39
- Swift, J. utters a good one 53 M L J 71
- Tenures—A feudal survival 53 M L J 163
- Tort—*Volenti non fit injuria*—Danger of golf 29 Bom L R 118
- Negligence—Golfer and motor-car 29 Bom L R 53
- Contributory Negligence —Speeding the (wedding) guest 29 Bom L R 36
- by Animals 45 C L J 11 n ; 21n
- Libel on the dead 31 C W N 113
- Mental suffering by failure to honour cheques—Damages for 31 C W N 27
- Trespass by animals "Cat among the Pigeons" case 31 C W N 26

Tort

- Malicious prosecution—Making criminals pay 28 Cr. L J 64
- Negligence—What is professional negligence 28 Cr L J 43
- Public and the theatre 28 Cr L J 23
- Contributory negligence — Speeding the (wedding) guest 52 M L J 16
- Indecent posters— "Licentious spectacle"—French Music-hall 38 M L T 16
- Contributory negligence — Speeding the (wedding) guest 38 M L T 15
- Trespass by animals — "Cat among the Pigeons" case 38 M L T 15
- Master's liability for servant's acts 4 O W N 36
- Contributory negligence—Speeding the (wedding) guest 4 O W N 15
- T. P. Act, S. 1—Local Government cannot extend a provision so as to give it an effect not contemplated by the Act: 5 Rang. 7 (P. C.) discussed 52 M L J (n i c) 33
- S. 3—Act 27 of 1926—Retrospective effect of: A. I. R. 1927 All. 1 discussed 38 M L T 25
- S. 3 — Notice — Possession as notice 8 P L T 79
- S. 54 (6) (b)—Sale by father—Junior members also made parties to suit for specific performance and in the alternative for damages —Decree for return of earnest-money held not sustainable: 6 Pat. 323 (P. C.) disc. 53 M L J (n i c) 25
- S. 55 (6) (b)—Agreement of sale unregistered—Admissibility in evidence 31 C W N 29
- S. 58—Effect of sale and agreement to reconvey: 49 All 405 discussed 53 M L J (n i c) 33
- S. 58—Sale with condition of repurchase: 48 All 787 discussed 52 M L J (n i c) 16
- S. 59—Attestation of documents 8 P L T 5
- S. 61—Unfructuary mortgage and simple mortgage in favour of same mortgagee—Assignee of mortgagor must redeem both: 50 Mad. 180 (P. C.) disc. 52 M L J (n i c) 39
- Ss. 95 and 74—Subrogation and Limitation 53 M L J 1
- S. 108 —Fixtures — *Quicquid plantatur solo adit* 53 M L J 73

T. P. Act

- S. 108—Landlord's obligation to repair 4 O W N 28
- S. 123—Donor cannot revoke after delivery of gift-deed even before registration; A. 1. R. 1927 P C 42 discussed 8 P L T 53
- Trials—Witch—A medical test 29 Bom L R 13
- Witch trials 29 Bom L R 12
- Treasure-trove 29 Bom L R 52
- Trusts Act, S. 63—Limits of the Doctrine of tracing 53 M L J 133
- Women and the Magna Carta 31 C W N 13
- Watan property and adverse possession 29 Bom L R 81
- Will—Construction—"effects" interpreted: 5 Rang 427 (P. C.) discussed 53 M L J (n i c) 51
- Construction—Life estate to widow with power to adopt—Whether widow is divested by adoption of her rights: 49 All 579 discussed 53 M. L J (n i c) 49
- Wit and humour—Genealogy of a Joke 28 Cr L J 90
- Swift J., utters a good one 39 M L T 46
- Witness giving evidence on indecencies 4 O W N 33
- Boat running away with an ass 4 O W N 33
- Proving who was an owner of a little dog 4 O W N 29
- A witness who had left his native country 4 O W N 27
- A Judge's father compared with the son 4 O W N 25
- A Judge's library 4 O W N 25
- A miser giving and bequeathing 4 O W N 25
- Young "story" 4 O W N 21
- Jury of women 4 O W N 21
- Law in everyday speech 4 O W N 3
- Witchcraft and the law 53 M L J 67
- Witness feigning madness 4 O W N 32
- Women; Mc Cardie J., on 53 M L J 164
- Words—"Business"—What is business 1927 M W N 99
- Legal Phrases and Idioms A I R J 96
- "Right Honourables" 53 M L J 97
- "Esquire," who is 53 M L J 91
- "Esquire," who is 4 O W N 72
- Workmen's Compensation Act — Saving, if necessary, of life 31 C W N 187
- Wort, Hon'ble Mr. Justice 8 P L T 27

THE ALL INDIA REPORTER

JOURNAL SECTION

1927]

[January

THE NEW YEAR

We have much pleasure in communicating to our numerous readers and to the learned members of the legal profession, on the Bench and at the Bar, our hearty good wishes for a prosperous and happy New Year. The first day of January 1927 will be a red letter day in the annals of the legal profession in this country. Defective though it may be in many particulars, the Indian Bar Councils Act, which will come into operation on the New Year Day, will be a milestone on the road to progress of the legal profession in this country. We look back with satisfaction upon the humble services, which we have been able to render in connexion with the enactment of the Indian Bar Councils Act. We hope that in the coming year the members of the legal profession will effectively organize themselves to give full effect to all the progressive provisions of the new Act and to see that the several High Courts make promptly the necessary rules for bringing into existence at an early date the several Bar Councils contemplated under the Act.

The members of the Bar have a more important duty to discharge in connexion with legislation both in the Imperial and in the Provincial Legislatures. While on the one hand a popular Legislature gives full facilities for giving effect to such amendments to a bill as commend the general approval of the members, it is its inherent defect that at the eleventh hour amendments are moved and carried which do not fit in with the scheme of the bill and which may in certain cases lead even to inconsistent and irreconcilable provisions in the same statute. The technique in the matter of drafting bills and amendments at the instance of private members of the Legislatures has to be improved a great deal. Large questions of constitutional propriety, and questions involving the respective jurisdictions of the executive, the judiciary and the Legislature are likely to present themselves for solution. It will be the duty of the members of the Bar to express their collective opinion on such matters and to give the lay public a lead which will be on sound and proper lines.

The members of the Bar have before them the important duty of getting the enhanced Court-fees reduced immediately. The year that has just passed showed signs of trade revival and general prosperity, which is acknowledged on all hands. The time has therefore come when the increased revenues should be utilized not for increasing expenditure but to effect a substantial reduction in the enhanced Court-fees. It is the duty of the members of the Bar to carry on a continued and sustained agitation in this matter. We have been expressing the feeling that our Universities and Bar Associations should take more lively interest in the development of the scientific study of law, as distinguished from legal studies, with a view to the requirements of a practising lawyer.

We take this opportunity to express our gratitude to our numerous readers and well-wishers for the warm support which we have consistently received at their hands for the last five years and to our learned correspondents for their active co-operation with us in making our editorial columns serve the best interests of the Bar. We hope that in the new year it will be our privilege to continue as hitherto our humble services for the fulfilment of the programme and the achievement of the ideals outlined above. We again repeat our hearty good wishes for the general prosperity of the Bench and the Bar, and we fervently hope that the Bar will be enabled to prove itself a great force for the promotion of the general good.

Notes and Comments

RELIEF OF INSOLVENT DEBTORS

We have much pleasure in congratulating the Bombay Legal Aid Society on the useful work which is being done by it in connexion with the question of giving facilities for poor litigants. The Memorandum prepared by Mr. N.M. Joshi, the President of the Bombay Legal Aid Society, and submitted by the Society to the High Court of Judicature, Bombay, which is printed in extenso in our columns of this issue, is a thought-provoking contribution to the subject of Insolvent Debtors in absolutely indigent circumstances. The criticism against the Bombay Rules made therein are in our opinion well founded and we hope the learned Judges of the Bombay High Court will be pleased to make the necessary amendments in the Insolvency Rules so as to bring them in consonance with the main principles of the Insolvency Law recognized by all modern systems of jurisprudence. On some of the points outlined in the said memorandum we may just observe that in the rules made under the Provincial Insolvency Act by the High Courts of Madras, Calcutta and Allahabad the suggestions adumbrated in the memorandum have been already recognized and largely given effect to.

Rule 22, Cl. 2 of the Madras Provincial Insolvency Rules, 1922, gives the discretion to the Court to require the debtor who presents the petition to make the necessary deposits for costs, etc. There is no obligatory minimum prescribed as is found in R. 55 referred to in para. 10 of the memorandum.

With reference to costs of notices R. 37 of the Allahabad High Court Insolvency Rules makes it clear that on a debtors' petition, if the Court is satisfied that the debtor is unable to pay the cost of publication in the Local Official Gazette of the notices required by the Act the Court shall direct that such cost be met from the sale proceeds of the property of the insolvent. The rule further provides that if the insolvent has no property, or if the sale proceeds are insufficient such costs or the irrecoverable balance thereof, shall be remitted.

Rule 22 of the Madras Provincial

Insolvency Rules provides for the publication of notices free of charge and in the case of a composition or scheme that is approved of by the Court, the costs, incurred by a debtor, of the application to approve the composition or scheme are allowed out of the estate.

To the same effect is R. 32 of the Calcutta High Court Provincial Insolvency Rules and R. 36 of the Allahabad High Court Provincial Insolvency Rules.

We may also point out that R. 133 of the Insolvency Rules of the Madras High Court under the Presidency Towns Insolvency Act gives a very wide discretion to the Court in the matter of costs and in giving directions that costs be paid out of the estate of the insolvent in the hands of the Official Assignee.

Under the English practice, as stated in 2 Halsbury at page 321, the costs of and incidental to any proceeding in Court are in the discretion of the Court.

The days when in the words of a text writer "All bankrupts, without distinction, were treated as criminal offenders" have now gone past. Every civilized system of jurisprudence recognizes it as an elementary principle that relief should be given to insolvent debtors subject to certain safeguards and restrictions. What is given by the right hand should not be taken away by the left. The beneficent provisions of the statute should not be nullified by the Statutory Rules. We hope that the learned Judges of the Bombay High Court will view with sympathy the justice and the propriety of the criticisms levelled at the Bombay Rules by the Bombay Legal Aid Society.

Relief of Insolvent Debtors.

The following is a copy of the petition submitted by the Bombay Legal Aid Society to the High Court of Judicature, Bombay.

To,

The Honorable the Chief Justice
and Judges of the High Court.

The Humble Petition of the Bombay
Legal Aid Society.

Respectfully Sheweth :

1. That one of the objects of the Bombay Legal Aid Society (hereinafter referred to as "your Petitioners" is

to co-operate with the judiciary so as to make justice accessible to the poor.

2. Order 33 of the Code of Civil Procedure deals with suits by paupers and O. 44 with pauper appeals. O. 33, R. 1 defines a "pauper" to be a person who is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred rupees, other than his necessary wearing apparel and the subject-matter of the suit. It has been held that the Court has inherent power to allow a defendant also to defend as a pauper.

3. Order 33, R. 8 provides that where the application to sue (or defend) as a pauper is granted, the pauper shall not be liable to pay any Court-fee (other than fees payable for service of process) in respect of any petition, appointment of pleader or other proceedings connected with the suit.

4. Where a person is admitted to sue or defend as a pauper, the Court may, if necessary, assign an advocate or attorney, or both, to assist him; and an advocate or attorney so assigned shall not be at liberty to refuse his assistance, unless he satisfies the Court that he has good reason for refusing. No person shall take or agree to take, or seek to obtain from him, any fee, profit or reward, for the conduct of his business in the Court. (Rules 109 and 205 of the Bombay High Court, Original Side).

5. The circumstance that, in determining whether an applicant is possessed of sufficient means, the subject-matter of suit is excluded, makes it possible for a person to obtain the privileges accorded to a pauper, although he may be laying claim in the suit to property worth thousands of rupees and may have, *prima facie*, a cause of action in regard thereto [O. 33, R. 5, sub-Cl. (d).].

6. Thus the privileges accorded to a pauper are considerable, and enable him to obtain property of any value for himself, without practically any initial costs, charges or expenses. The underlying principle of the law and practice as to paupers seems to be that no subject of the Crown shall be prevented from obtaining property to which he may be entitled, through His Majesty's Courts, by reason only of poverty.

7. The object of the Presidency Towns Insolvency Act is of wider application. It may be broadly stated to be, to ensure a complete distribution of the property of a debtor among his creditors and the relief of an honest debtor from liability for his debts.

8. Section 102 of the Act gives the Courts having jurisdiction under it the power to make rules for carrying into effect the objects of the Act, subject to the sanction of Government (S. 113), and in particular, to make rules to provide for and regulate:

- (a) The fees and percentages to be charged under the Act and the manner in which the same are to be collected; and
- (b) the investment of unclaimed dividends, balances and other sums appertaining to the estate of insolvent-debtors, and the application of the proceeds of such investment.

9. Under the power so reserved, the High Court has framed Rules under the Act. Rule 51 provides that the fees and percentages set out in Appendix II to the Rules shall be charged and received by the Chief Clerk, upon the several proceedings, documents and matters in the said Appendix specified as chargeable. The said fees include fees to be paid for:

	Rs.	a.	p.
Filing petition	2	0	0
Filing schedule	1	0	0
Application for order of discharge	2	0	0
Preparing every notice per folio	0	12	0
Serving each notice	0	12	0
Every service by general post	0	4	0

10. Rule 55 provides that upon the presentation of a petition by the debtor, he shall deposit with the Chief Clerk the sum of Rs. 20 and such further sum as the Chief Clerk may, from time to time, require, to cover the fees and expenses to be incurred by the Chief Clerk.

11. Rule 128 provides that an insolvent shall not be entitled to have any of the costs of and incidental to his application for his discharge allowed to him out of his estate.

12. On adjudication all the property of the insolvent wherever situate vests in the Official Assignee and becomes divi-

sible among his creditors (S. 17). Any property acquired by the insolvent upto the time of his discharge also vests in the Official Assignee (S. 52). S. 58 requires the Official Assignee to take possession of all the property of the insolvent. In cases where the insolvent is in the receipt of a salary or income, the Court is given the power under S. 60 to appropriate a portion of the salary or income to the creditors.

13. The only property of the insolvent which does not vest in the Official Assignee is stated in S. 52 to be :

- (b) The tools (if any) of his trade and the necessary wearing apparel, bedding, cooking vessels and furniture, of himself, his wife and children, to a value inclusive of tools and apparel and other necessities as aforesaid not exceeding three hundred rupees in the whole ; and,

Section 75 authorizes the Court to make an allowance to the insolvent out of his property, for the support of the insolvent and his family or in consideration of his services. Save as aforesaid, the insolvent is prohibited from retaining any property for himself. The Act therefore does not permit the insolvent to retain anything out of his estate to enable him to defray the fees and expenses aforesaid ; nor does it permit the Official Assignee to meet the same from the estate of the said insolvent, or from the Unclaimed Dividend Revenue Account or otherwise.

14. Not only does S. 38 give liberty to an insolvent to apply to the Court for an order of discharge at any time after adjudication ; but the Court is given power to prescribe the time within which the insolvent shall apply for his discharge and, in default, to annul the adjudication (S. 41). Accordingly, R. 136 of the Rules of the Bombay High Court provides that where an insolvent does not apply to the Court for his discharge under S. 38 for a period of eighteen months from the date of the order of adjudication, the Court may annul the adjudication.

15. The Act therefore imposes certain duties on the insolvent, and deprives him, at the same time, of the means to perform those duties. The fees required to be deposited with the Chief Clerk before entertaining an application for discharge, are very often considerable.

In Insolvency Case No. 1341 of 1924 the insolvent was required to deposit with the Chief Clerk Rs. 380 on account of the fees as a condition precedent to his application for discharge being even taken on the file. The insolvent in the said case applied to the Official Assignee to pay the fees out of the insolvent's estate in his hands (which was considerable), but the Official Assignee declared his inability to do so. As a consequence, and as the insolvent had no means, he was unable to apply for his discharge and his matter languished. The said illustration is only one of many such to be found in the Insolvency records of the High Court.

16. When regard is had to the conditions under which a debtor may petition under the Act, (S. 14), viz :—

- (a) that his debts amount to Rs. 500, or
(b) that he has been arrested and imprisoned in execution of a decree for the payment of money, or

(c) an order of attachment in execution is made and is subsisting on his property,

and to the other provisions as to the vesting of his property in the Official Assignee, it is, your Petitioners submit, unjust that he should be required to make the deposit under R. 55 of the High Court Rules or pay the charges prescribed in Appendix 2, out of his own pocket, and without recourse to his estate which may have vested in the Official Assignee.

17. The hardship will be all the more evident when it is submitted that the Rules do not provide for the fees and expenses payable by the insolvent being met out of his estate, even if he is granted an unconditional discharge and the Court is satisfied that his insolvency was caused by misfortune without any misconduct on his part and that the insolvent had rendered the fullest assistance to the Official Assignee in the realization and distribution of his estate.

18. Still more grave is the hardship where the insolvent has no assets. He is debarred from applying for his discharge, simply because of his inability to pay the fees. Your Petitioners understand that, in such cases, the adjudication is annulled under the said R. 136 and all the consequences of annulment as to execution of decrees against him, etc. apply to his case.

19. Under the National Bankruptcy Act, 1898, of the United States of America a bankrupt is held entitled to his disbursements and expenses in proceedings to obtain his discharge (*In re Dibblee*, 4 Ben. 304, Fed. Cas. No. 3887; *In Re Hatcher*, (D. C.) 145, Fed. 658; 16 Am. Bankr. Rep. 722). Under the South African Act 32 of 1916, taxed costs of sequestration, whether voluntary or compulsory, are allowed to be paid out of the bankrupt's estate in priority to the remuneration of the trustee, provided they have been necessarily and rightly incurred. Article 607 of the Law of 28th May 1838, (French Code of Commerce) requires notice of the application for discharge to be given to all the creditors. Article 5, however, of the Law of 23rd May 1908, dispenses with stamps and registration after the institution of the proceedings for discharge. The trend of opinion in England is indicated by the fact that the Poor Persons Rules (O. 16 as amended) are held to apply to an applicant who is worth as much as £ 50 (excluding wearing apparel, tools of trade and the subject-matter of the proceedings) or one whose income amounts to £ 2 a week. The relief of poor persons has been engaging attention of the League of Nations.

20. Your Petitioners submit that when the Legislature has conferred the benefit of the pauper procedure on individuals, in order to secure their private and personal rights and that, although, they may have admittedly a claim to considerable property involved in the litigation, it is not equitable that an insolvent who, under the Act, is debarred from retaining any property, and who is required to comply with the provisions of the

Act, should be denied the means to perform the duties laid upon him by the law, even if he has considerable property of his own, which has vested in the Official Assignee and the insolvent's services might have proved beneficial to the estate.

21. Your Petitioners submit that the aforesaid state of things calls for an inquiry and redress. Your Petitioners submit that the rules under the Act should be amended so as to provide that the exemptions allowed to a pauper shall also be allowed to a debtor on his being adjudicated insolvent; that the Official Assignee shall be empowered to defray the fees and expenses payable by the insolvent under the Rules, out of the insolvent's assets in his hands; and that in cases where the insolvent has no assets the said fees and expenses should be either entirely dispensed with or be defrayed out of the Unclaimed Dividened Revenue Account referred to in Rr. 178-179, or that the same may be otherwise provided for. To ensure that the exemption granted may not be abused, your Petitioners submit that liberty may be reserved to the Official Assignee or any creditor to apply to the Court at any time to remove the exemption if the insolvent has committed a breach of any provisions of the Act.

And your Petitioners will as in duty bound for ever pray, etc.

Dated this 17th day of November 1926.

N. M. JOSHI,

President,

Bombay Legal Aid Society

No. 110, Meadows St,
Fort, Bombay.

Adjournments under S. 526 (8) Criminal Procedure Code.

Our readers will peruse with interest the erudite and well-reasoned critical note on the decision of the Sind Judicial Commissioner's Court in the *King-Emperor v. Nathomal and others* which appears on another page in this issue. The said case is reported in A. I. R. 1926, Sind at page 137. We entirely agree with the observations of Mr. Rochaldas Karam Chand the learned writer of the critical note referred to. Without repeating the string of cases on this worn-out theme, we shall content ourselves by

extracting the following quotations, from Vol. 2 Halsbury's Laws of England :

It is the duty of the Judges to give fair and full effect to statutes without regard to the particular consequence in the special case, and not to indulge in conjecture as to what Parliament would have done if a particular case had been presented to its notice; for it may be presumed that the framers of a statute contemplated matters of ordinary occurrence.

There are also innumerable cases decided by the High Courts in India wherein the same principle is recognized. We venture to express the hope that

when the question again comes up before the Sind Court a fuller Bench will go into the whole question and reconsider the decision which has been so ably analyzed and criticized by the learned writer of the critical note :

A CRITICAL NOTE

In the Court of the Judicial Commissioner of Sind.

Criminal Revision 96 of 1925.

The King-Emperor v. Nathomal and others, A. I. R. 1926 Sind 137.

The Divisional Bench of the Court of the Judicial Commissioner of Sind, consisting of two Judges Dr. Do Souza, and Mr. Kennedy, has held in the above case :

(1) That the applicant can file his transfer application direct to the High Court, without in the first instance approaching the District or Sub-Divisional Magistrate.

(2) That when the applicant notifies his intention to the Magistrate to apply for a transfer from his Court, under S. 526 (8) Criminal P. C. the latter is not bound to adjourn or postpone the case unless he is satisfied that the accused has a real and a bona fide intention to make such an application to the High Court.

The learned Judges, while deciding the first point, do not agree with the Bombay High Court in their decision reported in 6 *Bom. L. R.* 480 basing their judgments solely on the ground that

there is nothing in the statute which renders it necessary to move the District or Sub-Divisional Magistrate in the first instance.

So far I do not feel myself concerned now, and therefore silently pass over it for the present.

But as their decision on the second point has exercised the minds of several of my pleader friends here, and has struck me as most unconvincing, I feel myself called upon to put forth an humble comment thereon, through the columns of your journal and expect a more elaborate and learned exposition on the point at the hands of the members of the Bar or Judiciary in Sind or elsewhere. This comment has been necessitated more for the reason, that the District Magistrates of Sukkur and Larkana have issued this decision as a Circular judgment in their districts and that has affected the Court going public seriously.

Dr. Do Souza, while fully admitting, and in fact, basing his judgment on the fact, that the wording of the present amended S. 526 is more comprehensive and liberal and in favour of the applicant than that of the Code of 1898, has yet thought fit to engraft new words into the Code and prefixed perfectly new adjectives to the words of the section, and has thus taken upon himself the duty which is properly the duty of the Legislature. With due deference, I should be allowed to say that it is never a function of the Judge to import his own words in the section when they never exist ; but in this case both the learned Judges have inserted the words "real" and "bona fide" as necessary prefixes to "intention to make an application" in the section. One of them has followed the Calcutta High Court Judges' observations in *I. L. R.* 31 Cal. 715 which is a decision of 1904 and was presumably brought to the notice of the Select Committee in 1916, and the present section as amended stands in spite of those remarks. This shows that the intention of the Legislature evidently was to the effect that there should be no room for pretext to a Magistrate to refuse an application for adjournment under S. 526 (8) and that the applicant should have an opportunity to move the High Court to have his fate decided in a Court in which he has more confidence whenever he comes to believe that he cannot have a fair trial. But the learned Judges, instead of reading the section from that stand-point have held that it could not have been the intention the Legislature to allow the applicant to have a postponement on merely notifying his intention.

Now whatever the object be, and whatever the opinion of some of the members of the Select Committee, the present S. 526 (8), as it stands now, gives absolutely no option to the Magistrate in the matter. No such words as "real" or "bona fide" find place there nor does a proviso, to the effect, that

unless he is satisfied that the accused has a bona fide intention to make an application. . . . , exist in the said section. I am therefore humbly of opinion that even without further argument this engrafting of prefixes or new provisos is repugnant to the letter of the law.

A few extracts from Mitra's Commentary on the Criminal P. C. (1924 Edn.)

and the (Joint) Committee's report and 22 All. L. J. page 430=A. I. R. 1924 A. 533 will be well worthy of quotation here, in my support which I do herebelow.

Mitra's Criminal P. C.

The words of the present section have been made more imperative by omitting certain words which occurred at the end of the old Sub-section and which took away the force of shall.

Joint Committee's Report.

Our amendment provides for a compulsory adjournment at any stage of the case except that a Sessions Court may refuse to adjourn (sub-S. 9) when it is of opinion that the application has been unreasonably delayed.

A. I. R. 1924 A. 533,

..... After the application for transfer had been made to his Court he would have adjourned the case at once.

The actual remarks are :

Under the new Code however, it is the duty of the Criminal Court to postpone the case at once. S. 526 (8) is imperative and omits the former expression "before the accused is called his defence."

This ruling will, I fear, have an effect of prejudicing the applicants seriously and might serve as the best pretext for the lower Courts, to throw off the applicants' prayer specially when they are sitting with a biased mind or are obsessed with the idea that they are doing it in the interests of speedy disposal. I cannot understand how, with all the safe guards and strict warnings issued by the learned Judicial Commissioner in the course of the same judgment, the lower Court Judges or Magistrates will be able to gauge the bonafides of the applicants and that too on the materials before them. Will the Magistrate stand up to feel the applicant, or his pleader's pulse or ask him to put in a number of affidavits or call a host of witnesses to prove his mentality then and satisfy the Court to the hilt that the applicant does really intend to make an application for transfer (though he may back out thereafter) or should he file a doctor's certificate to support him?

No doubt the motives of the Judges to put in such a rider to the section are sincere and are intended to put a check to certain vagaries of the applicants

which are instanced by them in their judgments; but in view of the clear provisions of the law as shown above, or otherwise such considerations should not weigh with the lower Courts. Let the Legislature by all means make further amendments on the point, if need be.

On a deep consideration of the question I am of opinion that a postponement is at least a lesser evil.

In the end it is submitted that the learned Doctor's taking help of Cl. 6 on the point is quite misplaced. The question of costs comes to operate only before the High Courts and that too only when they come to hold that the application filed for transfer was vexatious. That has absolutely no connexion with the point in dispute.

Lastly the very reasoning of the learned Judges that proceedings subsequent to the refusal of the application for postponement might be held void even if the High Court comes to decide that there was no ground for transfer goes to support me in so far, that it would under all circumstances be only too proper to grant a postponement on the applicants notifying his intention, and thereby save a good deal of public time which would be otherwise ultimately lost.

On perusal of the judicial Commr's two most important safeguards (1) of avoiding a refusal on mere conjectural grounds and (2) of ultimately holding the subsequent proceedings void, one cannot but come to the conclusion, that the learned Judicial Commissioner has fully felt the shaky nature of his pronouncement and has verily believed that their decision is not absolutely according to the letter of the law enacted in the code of Criminal Procedure.

Under such circumstances I submit the J. C.'s Court would be pleased to reconsider the above decision early and order its publication soon enough to counteract the action of the District Magistrates of Sukkur and Larkana.

District Court Pleaders } Rochaldas
Chambers } Karamchand,
Sukkur, SindD/-21-10-26 } Pleader Sukkur.

Reviews of Books

Fictions in the development of Hindu Law Texts. — (Being the V. Krishnaswami Aiyar Lectures, 1925 delivered under the auspices of the University of Madras). 229 pp.

It was an excellent idea that the memory of an eminent lawyer and Sanskrit scholar should have been perpetuated by his worthy son in the shape of a Lectureship on Hindu Law subjects with special reference to Sanskrit sources. Mr. Sankara Rama Sastri a good lawyer and a good Sanskrit scholar has done full justice to what might at first seem to be a rather unattractive subject; indeed he has made it as attractive as one can possibly make it.

Though the sources of law are authoritatively stated by Yajnavalkya to be :

* श्रुतिः स्मृतिः सदाचारः स्वस्य च प्रियमात्मनः ।

सम्यक् संकल्पजः कामः धर्ममूलमिदं स्मृतम् ॥

the keynote of the lectures is really a successful attempt to show how the ancient writers emphasize the omniscience, eternity and infallibility of the Vedas and trace everything else to the Srutis. In doing so, the lecturer gives very interesting details as to the various fictions employed by such writers to justify their conclusions; e. g. the theories of the last Sruti, the latent Sruti and the patent Sruti to trace the authority of the Smritis to Vedic origin, the theories of Sabaraswamin and Kumarila relating to conflict between Sruti and Smriti texts, the theories relating to the foundation of even customs in the Vedas and the various theories relating to interpretation such as Ekavakyata employed to deduce concord among conflicting sources of law. The lecturer goes further and traces how fictions are found at the very root of large branches of substantive law: e. g. the fiction of identity between the heir and the propositus justifying the right of the issue, the spouse, the slave and the disciple to inherit; the fiction of sonship by adoption carrying out many refinements in the law of adoption; the fiction of a child

* The sources of Dharma are (1) the Vedas, (2) the Smritis, (3) the practices of good men, (4) what is acceptable to one's own soul, and (5) the desire produced by a virtuous resolve. (Yajnavalkya, Ch. 1, 7.)

in utero being a person *in esse* leading to many principles in the law of alienation, of adoption, of majority, etc., the fiction of an idol being a person *in esse* leading to many principles in the law of religious endowments, the fiction of a gift involved in a sale, etc. The lecturer gives copious illustrations by means of comparisons and contrasts wherever possible from the English and Roman Laws and shows how fictions have founded scores of principles of those laws. A concise treatment of the divisions of the Hindu judiciary, their jurisdiction and the laws administered by them is also worthy of note.

The book exhibits a richness of detail, a rare degree of Oriental Scholarship and a sound comparative treatment of the subject and deserves to be valued as an acquisition to the library of any lawyer or oriental scholar.

M. B.

The Indian Stamp Law by Walter Russel Donogh—Revised by K. J. Rustomji, Bar-at-Law, Lahore, Seventh Edition, 1926 and published by Messrs. Butterworth & Co. Ltd., pp. over 680: Price Rs. 12.

This seventh edition is revised and edited by Mr. Rustomji, the well-known author of the Law of Limitation, owing to the death of Mr. Donogh. The Editor has added marginal notes and appropriate paragraph headings. Mr. Donogh never cited any decisions except those of the Chartered High Courts but the Editor has attempted to make this work more exhaustive and useful by utilizing the decisions of the Chief Courts and also the Courts of the Judicial Commissioners though the parallel references of each decision are not complete. The case-law has been brought down to June 1926. This edition is far more useful than the previous one apart from the incorporation of the intervening judgments.

Ghosh's Lawyer's Diary 1927 published by Messrs. M. C. Sirkar and Sons, Law Booksellers and Publishers, 90/2-A Harrison Road, Calcutta.

We have to acknowledge with thanks from Messrs. Sirkar and Sons, Calcutta the **Lawyer's Diary** and the **Gem Diary**.

THE ALL INDIA REPORTER

1927]

(JOURNAL SECTION)

[February

PRECEDENTS

It may be laid down as a general rule that that part alone of a decision of a Court of law is binding upon Courts of co-ordinate jurisdiction and inferior Courts which consists of the enunciation of the reasons or principles upon which the question before the Court has really been determined. This underlying principle which forms the only authoritative element of a precedent is often termed the *ratio decidendi*—(*Halsbury's Laws of England*—Vol. 18, Page 210.)

LAW REPORTING RULES

Mad. L. Journal (Vol. 3, page 223) (1893)

Edited by V. Krishnaswami Aiyar and P. R. Sundara Aiyar, afterwards High Court Judges, Madras ; and P. S. Sivasawmy Aiyar, ex-Advocate General and Executive Councillor.

A good example of the diffused character of the reports is to be found in the report of a recent decision of the Privy Council (20 *All.* 171 ; 172) in which the principal question was whether a particular mortgage-deed gave post diem interest, that is, a question of construction, and the question was also incidentally raised whether proceedings in Court stating the amount due on the mortgage fell within S. 17 of the Registration Act, 1877. On the first point the case is valueless, except to call the attention of the Court below to the general principles upon which the documents should be construed ; the second point is dealt with in eight lines of the judgment. Nevertheless, the reporter has filled ten pages with a statement of facts, the judgment of the High Court and the entire judgment of the Privy Council which sets out the exact terms of the mortgage-deeds and the history of the suit in the lower Courts. It would seem, in fact, that the judgments of the Courts are reproduced verbatim and are not edited at all, and this would appear to be a principal cause of the diffuseness of the reports.

Notes and Comments

A Short Note on the Recent Changes in Stamp Law relating to Promissory Notes payable on Demand.

(B. S. Mathur, Vakil, Bulandshahr.)

There are some dates to remember in connexion with the recent changes in the stamp law which a mofussil legal practitioner generally finds it difficult to remember, and when a case crops up, he has to hunt about the various Government notifications. This article has been written therefore to serve merely as a memorandum of dates, and should not be regarded as anything more than that.

Under the Stamp Act of 1899 the proper stamp duty on a promissory note payable on demand was one anna on any amount whatsoever. But this duty was enhanced by the Indian Stamp Amendment Act No. 43 of 1923, which imposed the following stamp duty on a promissory note payable on demand :

(1) When the amount or value does not exceed Rs. 250 : one anna.

(2) When the amount or value does not exceed Rs. 1,000 : two annas.

(3) In any other case : four annas.

By a notification published in the Gazette of India this Act was to take effect from 1st October 1923. But as a large majority of money lenders in the villages remained entirely ignorant of the new legislation the Government had to pass another Act—Act No. 13 of 1924 published in the Gazette of India, dated the 21st June 1924—which provided that all promissory notes payable on demand executed

between 1st October 1923 and 31st March 1924 which though they ought to have been stamped with two annas and four annas stamp duty shall be deemed valid if affixed with one anna stamp. But the trouble was not yet at an end. People instead of using one anna and half anna stamps which are meant for postal as well as revenue purposes used two annas and four annas stamps which are meant only for postal purposes. Hence again the necessity arose to clear the law and Act No. 11 of 1926 known as the Promissory Note (Stamp Act) was passed which further validated all promissory notes payable on demand executed after the 30th September 1923 and before 5th January 1925 if the full amount of duty was paid but postal stamps were used instead of the revenue stamps of one anna and half anna.

The net result of all these Acts is :

(a) That a pronote for any amount executed up to 31st March 1924 is valid if stamped with one anna stamp.

(b) That a pronote up to 5th January 1925 if stamped with two annas or four annas postage stamps is valid if the full amount of duty is paid thereon.

(c) That from 5th January 1925 the pronotes must bear revenue-stamps of proper description and proper denomination.

Can the Opposite Party under S. 488 of the Criminal P. C. be called an "accused" person?

(Manilal K. Poonater, Pleader, Bhanwad.)

The decision of the Lahore High Court, as reported in *All India Reporter* 1926 Lahore 667 (*Demello v. Mrs. Demello*) must cause some anxiety and flutter in Indian legal circles. His Lordship has held "I consider, that the omission of the Magistrate to examine the accused as required by S. 342, Criminal P. C., vitiated the order granting maintenance."

Unfortunately, as it is reported, the case is not represented by any pleader or advocate on either side. It is to be regretted that his Lordship's attention

was not attracted to S. 340 (2) of the amended Criminal P. C.

It thinks, his Lordship is misled by the word "accused" in S. 488 (7) of the old Act. In S. 488 of the Criminal P. C. as amended, the word accused is not used at all. The party against whom the proceedings are taken under S. 488, is made known as a person against whom proceedings are taken. Old sub-R. 7 is advisedly omitted in the amended Code. He is not called an "accused" person (1 Cr L. J. 864) and the act of refusing

maintenance is not an offence as defined in S. 4 (o) Criminal P. C. (13 P. R. 1885 ; 3 P. R. 1893). Proceedings under the section are of a civil nature ; and parties can be examined on oath. The new amended Code has made no alteration in this respect ; and the old cases hold good up to this time. S. 340 (2) declares that "any person against whom proceedings are instituted in any such Court under * * * Chap. 36 * * * may offer himself as a witness in such proceedings." This makes quite clear that the person is not an "accused." Though S. 342 applies to a summons case, as the proceedings are of a civil nature and the opposite party can be administered oath and examined, cross-examined and re-examined, he cannot be regarded an "accused" person. The word "accused"

is used in S. 342 and the omission of the same word from S. 488, makes it quite clear that the legislature does not intend to regard the opposite party as an "accused" person, and so S. 342 cannot apply to proceedings under S. 488. When he is not an "accused" person, there is no necessity of asking him questions under S. 342. So, the omission cannot vitiate the trial. Both the cases relied on by the learned Sessions Judge as shown in the reference order and not adversely commented upon by his Lordship (*A. I. R. 1924 Lahore 104* ; *A. I. R. 1926 Sind 1*) are not cases under Chap. 36 and cannot apply to the present case.

In my humble opinion, the question requires reconsideration whenever it next arises.

Reviews

The Law of Joint Acts, Abetment and Conspiracy.—By *Mr. Munindra Nath Ganguli, B. L., Pleader, Judge's Court, Howrah*, 1926 Edition, over 650 pp. published by *Messrs. Eastern Law House, Calcutta*. Price Rs. 6.

This is the first book dealing exhaustively with the law of participation in crimes. One would hardly imagine that there could be about 500 cases of the Indian Courts dealing with this branch of the law, and therefore a commentary of nearly 700 pages is indeed welcome. The treatment of cases of each High Court separately in connexion with any particular proposition of law which is very uncommon is, however, a great merit from the point of view of the convenience of the overworked practitioners and Judges, who often desire to know first the view of their own High Court. The branch of law dealt with in this book is covered by Ss. 34 to 38, 107 to 120 and 120A and 120B of the Indian Penal Code. There is a good deal of conflict in the Indian decisions as to the exact nature and scope of the liabilities of persons participating in crimes, and unfortunately this is increased by conscious or unconscious attempts to borrow from the common law of England the principles thereof for interpreting the statutory provisions applicable to India. The different liabi-

lities under the sections referred to above have been very carefully compared not only amongst themselves but with the forms of responsibility known to English law. The procedural law too has been dealt with, an independent chapter being allotted to each different subject, thus facilitating search for a particular point. The use of Antique paper, which, as is well known, though rough for touch, makes excellent reading. The get-up maintains the level of the publications of the Eastern Law House.

The United Provinces Land Revenue Act (Local Act 3 of 1901) as amended by subsequent Acts, up-to-date with Notes and Commentaries : By *Mr. Mata Prosad Saksena, Hardoi*, 1926. Price Rs. 9.

This commentary has been already recommended by the Board of Revenue, U. P., for use in all the revenue Courts in the United Provinces, and this fact alone is sufficient to indicate the merits of the work. The Notes and Commentaries which bring the case-law down to-date contain full references to the Revenue Manual and the Circulars of the Board of Revenue and are arranged under very convenient headings and sub-headings. The get-up is commendable.

The Law of Private Defence : By *Mr. Anukul Chandra Moitra, M.A., B.L.*,

with a Foreword by Sir A. Chaudhuri, Kt., *Bar-at-Law*, Second Edition, 1926 : Over 430 pp. Royal Octavo : Published by Messrs. Butterworth & Co. Ltd., Calcutta : Price Rs. 6-8-0.

This treatise still remains the solitary work on the subject of private defence, and it seems likely that it will remain unsurpassed for a long time to come. The exhaustive treatment of the subject can be imagined from the fact that this small subject which is dealt with in Ss. 96 to 106 of the Indian Penal Code has been divided into not less than eleven Chapters, viz., Introductory, Burden of Proof, Commencement of the Right, Continuance of the Right, Defence of Property, Justifiable Homicide, Acts of Public servants, State Help, Exceeding the Right, The Right against Non-criminal acts and Dispersal of Assembly and Processions and Meetings. It is a matter of surprise that such a small subject should have made necessary a second edition in the short space of three years, but the author's treatment of the subject entirely accounts for this success. Though the right of private defence is an elementary right of citizenship and though every citizen ought to know his rights clearly, unfortunately in India even those who are better circumstanced than the ordinary public are often not aware of the exact extent to which the right could be enforced. And indeed from this point of view this treatise is not only extremely welcome to the legal practitioners but to every member of the public. The seemingly contradictory authorities have been intelligently sifted and analyzed and the common principles underlying them have been laid bare. As Sir A. Chaudhuri has observed in his foreword "owing to misconceptions prevalent in the mufassal on these points (State help and Exceeding the right) the right of private defence has been unfortunately denied in a good number of cases, as a glance at any law report will show. The true bearing and import of these limitations have been very clearly set forth in this book." In short, the treatise is quite self contained as it obviates the necessity of referring to other books which are not often available to the mufassal practitioners. A

chapter on Processions and Meetings is a special feature of this edition, many chapters of which have been entirely re-written. The get-up of the work is excellent.

The Law of Madras Local Boards—By Mr. C. V. Naidu, Pleader, Tiruvallur, (Chingleput Dist.): over 1000 pp., 1926 : Price Rs. 10.

The first edition of this work which was styled "Madras Local Boards Manual" has developed into a more exhaustive work and has therefore changed its title to "The Law of Madras Local Boards." So far as we are aware there is no work similar to this not only in Madras Presidency but in the other provinces dealing exclusively and so exhaustively with the law of the Local Boards. The necessity and the merits of the Manual were already proved by the recognition and the use by the Local Government, the Judiciary and the members of the Bar and also of the Local Boards. The explanatory and the critical comments which have pressed into service not only the Indian decisions but the important English judgments too, are quite exhaustive and up-to-date and in fact even short notes of cases which are not fully reported have been also utilized. The inclusion of the Madras Elementary Education Act, the Indian Election Offences Act, and the Madras Village Panchayats Act will also help the readers in better understanding the Local Boards Act. Looking to the print and the get-up of this edition which is excellent and to the fact that it is mainly of use in the Madras Presidency, the price is certainly very moderate.

The Law of Promissory Notes—By Mr. T. R. Venkatesa Aiyar, High Court Vakil, Triplicane, Madras, 1927 : Price Rs. 4-8-0.

We welcome this book as the first attempt to deal exclusively with the subject of promissory notes. Part I of the book contains the whole of the Negotiable Instruments Act while Part II covers the sections and portions of the Sections of the Acts that are applicable to Promissory Notes. This arrangement is intended by the author to minimize the work of the busy practitioner.

THE ALL INDIA REPORTER

1927]

JOURNAL SECTION

[March

PRECEDENTS

(22 All. 453 at 459, *Banerji and Aikman, JJ.*)

" Unless, (therefore) it is established that a decision already given after careful consideration is grossly erroneous, the Court should be loath to depart from it, even if its correctness may be open to question, and even if the opinion expressed in it is only *obiter dicta*."

LAW REPORTING RULES

Mad. L. Journal (Vol. 3, page 223) (1893)

*Edited by V. Krishnaswami Aiyar and P. R. Sundara Aiyar, afterwards
High Court Judges, Madras ; and P. S. Sivasawmy Aiyar, ex-Advocate
General and Executive Councillor.*

Law Reporting :.....Diffuse detail detracts from the merit of a law report, it obscures the point of the decision. Who is to blame ? It may be said that to some extent the Judges are to blame. No doubt, the opinions delivered from the Bench are often unnecessarily long ; and several opinions are frequently delivered, where one would be sufficient. Long and heated argumentative dissents, and small academic disquisitions on points not involved in the case, however gratifying to their authors, are both out of place in delivering judgment. But the *reporters* have a *responsibility* in the matter. It is for them to distinguish between a real judgment and the talk and friction that accompany it. It is also a question whether in the public interest, and also in the interests of the parties Judges should be permitted to revise opinions which have once been delivered in open Court ; *verbum irrevocabile volat*. Some Judges would prefer not to be reported at all, rather than be reported *verbatim*. This in itself would be a gain, for it would compel the Court to deliver a great number of considered judgments representing the unanimous opinion of the members of the Court : * * * Only that portion of the *judgment* should be given which deals with the point for the sake of which the case was reported, and the Reporter should also eliminate all recitals of the evidence, and the reasoning of the Court thereon. Also it is unnecessary to set out in full sections of common Acts quoted by the court, such as a section of the Criminal P. C. (25 Cal. 215) or the Tenancy Act (25 Cal. 216), or quotations from reported cases (20 All. 55), or common forms prescribed by the rules of Court (25 Cal. 216).

IS INSURANCE AMOUNT A DEBT ?

(BY P. V. Subramania Sharma, B. A., LL. B., *Vakil, Tinnevely.*)

An insurance company insists on a succession certificate in all cases of succession to the estate of the assured, unless the succession is through a Will and probate has been obtained of that Will. The demand for a succession certificate is made by the insurance company on the hypothesis that the insurance amount is a 'debt' belonging to the estate of the deceased policy-holder. The problem whether the money due from an insurance company on the death of the assured is a 'debt' within the meaning of S. 4 of the Succession Certificate Act, 1889 (which is now incorporated as S. 370 in the Indian Succession Act of 1925) is not so easy of solution as it at first sight may appear.

Let us first turn to Calcutta and review the evolution of the case-law there on the point. The word 'debt' seems to have been first judicially interpreted in *Nemdhari Roy v. Bissessari Kumari* (1). There it was held that the Act referred to such debts as the deceased could sue on and that for debts falling due after death, an heir might sue without a succession certificate. So it impliedly excluded from the category of 'debt' the amount due from an insurance company on the death of the assured, inasmuch as it was not a debt which the deceased could have sued on. This interpretation was considered to be narrow and dissented from in *Bauchharam Majumdar v. Adyanath Bhattacharjee* (2) by a Full Bench of five Judges. The sum and substance of that decision is that 'debt' is a sum of money which is now payable or will become payable in future by reason of a present obligation. Subsequently in *Mahomed Abdul Hossain v. Sarifan* (3) an heir of a deceased Mahomedan lady sued her husband for a portion of a deferred dower due by the husband to the deceased. It was held that the claim was for a 'debt' within the meaning of the Succession Certificate Act and that therefore an application for a succession

certificate lay. In *Annapurna Dasee v. Nalini Mohan Das* (4) Mr. Justice Woodroffe has pronounced that the word 'debt' is a comprehensive term which should receive a liberal construction. Lastly, in *Charu Sila Dasi v. Jyotish Chandra Sirkar* (5) Justice Sir Herbert Holmwood and Mr. Justice Imam have drawn pointed attention to an obiter dictum of Mr. Justice Mukerjee's in *Bauchharam Majumdar v. Adyanath Bhattacharjee* (2) which speaks of unliquidated sums as not being existing debts, and have concluded, adopting the obiter dictum, that an insurance amount when it is an ascertained sum of money payable on the death of the assured, no doubt, comes within the purview of the Succession Certificate Act, but not an insurance amount which is entirely unascertained during the lifetime of the insured and which can only become ascertained after his death.

In the High Court of Madras, the first light thrown upon the doubts was in *The Oriental Government Security Life Assurance Co. Ltd. v. Venteddu Ammiraju* (6). Among other things, it was held therein, that the policy of the insurance company was part of the estate of the assured. The Judges based this conclusion on *Cleaver v. Mutual Reserve Fund Life Association* (7). This English case is rather interesting. A widow claimed an ascertained sum of £2,000 under a policy of insurance effected by her deceased husband, whose death she herself brought about. Besides the question of the insurance money forming part of the estate of the assured, there was a more important question, which does not now concern us. The Madras case just cited does not notice that the policy money in the English case was an ascertained sum of money—a fact to which considerable importance has been very properly

(1) [1898] 2 C. W. N. 591.

(2) [1908] 36 Cal. 936=18 C. W. N. 966=3 I. C. 492=10 C. L. J. 180 (F. B.).

(3) [1911] 16 C. W. N. 231=12 I. C. 593=15 C. L. J. 384.

(4) [1914] 42 Cal. 10=23 I. C. 556=18 C. W. N. 836.

(5) [1916] 33 I. C. 157.

(6) [1911] 35 Mad. 162=10 I. C. 263=(1911) 1 M. W. N. 276.

(7) [1892] 1 Q. B. 147=61 L. J. Q. B. 128=66 L. T. 220=42 W. R. 230=56 J. P. 180.

attached in *Charu Sila Dasi v. Jyotish Chandra Sirkar* (5). The above Madras case has been overruled in *Balamba v. Krishnayya* (8), but not on the point that an insurance amount forms part of the estate of the assured, which remained intact. The next Madras case reported on the subject is *Srinivasachariar v. Ranganayaki Ammal* (9), decided by Mr. Justice Sadasiva Iyer and Mr. Justice Napier. The judgment is provokingly short and all that it says is that the application for a succession certificate was misconceived, as the insurance company was not a debtor of the deceased and the insurance money did not form part of the estate of the deceased. It is rather in the nature of a dogma. There is no attempt at reasoning; nor is the previous case law on the point sought to be explained away. When a certain prior decision of a High Court is in effect overruled by a subsequent decision of the same Court we should certainly look for adequate reasoning. *Srinivasachariar v. Ranganayaki Ammal* (9) practically overrules *The Oriental Government Security Life Assurance Co. Ltd. v. Vanteddu Ammiraju* (6) on the point, with which we are concerned; and yet there is not even an attempt at reconciliation between the present and past state of the law. Perhaps, this case of indiscriminate reporting of cases and *Srinivasachariar v. Ranganayaki Ammal* (9) was not worth reporting.

The High Court of Madras, treats us to the spectacle of another legal somersault in a case decided on 12-10-1926 the short notes of which appear at p. 57 of the Short Notes Section of 51 *M. L. J.* (1926). The decision is that the amount

(8) [1913] 37 Mad. 483=25 *M. L. J.* 65=20 *I. C.* 931=(1913) *M. W. N.* 697.

(9) [1915] 3 *L. W.* 466=32 *I. C.* 991.

due under an insurance policy payable at the age of 55 or death is a 'debt' within the meaning of Section 4 of the Succession Certificate Act. The process of reasoning by which the decision was arrived at is not yet available to us. However, we may confidently expect some show of reasoning in this case, though we must sometimes confess to a feeling of disappointment with reference to similar expectations.

The other High Courts too have had occasion to tackle this knotty problem. In Bombay, in *Shankar Vishvanath v. Umabai* (10), it has been held that the money under an insurance policy forms part of the estate of the assured on his death. Whether it would be so even before his death was not necessary to decide in that case, nor does it exactly interpret 'debt' as used in the Succession Certificate Act. In Allahabad, in *Abdul Karim Khan v. Magbul-un-nissa Begum* (11) the dower of a Mahomedan wife, whether prompt or deferred, has been held to be a 'debt' within the meaning of the Succession Certificate Act.

Attention is called to this conflict of decisions only to urge the need for a precise definition of the word 'debt.' In pursuance of the reforming activity of Mr. Sethna in the Council of State, Sir Hari Singh Gour, in his speech of the 18th March 1925 in the Legislative Assembly, made a pointed reference to the nebulous state of judicial interpretation of 'debt' in the different High Courts and pleaded for a statutory provision, which could preclude the possibility of a further conflict of authorities. His suggestion has apparently been thrown away. But it is never too late to mend.

(10) [1913] 37 Bom. 471=19 *I. C.* 736=15 Bom. L. R. 320.

(11) [1908] 30 All. 315=(1908) *A. W. N.* 113=5 *A. L. J.* 598.

Reviews

Trials of Charles Frederick Peace : Edited by *W. Teignmouth Shore* and published by Messrs. *Butterworth and Co. Ltd.*, Calcutta, 1926. Edition, over pp. 200 : Price Rs. 6-8-0.

This thirty-eighth volume well maintains the level of the Series of Notable British Trials though the arrangement of the material in this volume

differs considerably from that adopted in the other trials of this series. Probably no other arrangement could have succeeded in giving a consecutive and clear narrative especially in view of the scarcity of information regarding Charles Peace alias John Ward. This murderer, after his conviction for murder of Mr. Dyson, confessed to having murdered

Mr. Cock, for whose murder one Habrons was convicted, and still the Cock murder remains and must remain an unsolved puzzle. The editor has very pertinently remarked: "Altogether it seems that the police jumped to conclusions first, and looked for proof second." A cursory reading of this volume will amply convince any dispassionate reader of the pitfalls of relying too much upon circumstantial evidence, and it is especially from this point of view that the legal profession will find the work to be of more than common interest.

Banking Law and Practice in India by *M. L. Tannon*, Bar-at-Law, Principal, Sydenham College of Commerce, Bombay, and published by *Messrs. Butterworth and Co. Ltd.*, Calcutta, 1927 edition: over 400 pp; Price Rs. 7-8.

Besides the two books dealing with banking in India, one by Mr. B. R. Rao and the other by the author, there are probably very few other books that deal with Banking in India to the extent to which the volume under review has done and indeed so far as the Banking Law is concerned this is the first book of its kind. It is only during the last decade that the differences between the Indian and the English Laws of banking were markedly noticed and the book pointing out the differences and dealing with the Indian Law was a great desideratum not only to the students of Indian Banking Law and Practice but to the bankers and lawyers and also to people who have any dealings with banks. As pointed out in the foreword by Sir Norman Macleod, ex-Chief Justice of the High Court of Bombay, "the failure of many indigenous banks in 1913 showed the danger of attempting the extension of banking to the country districts without taking the precaution to provide that the business was conducted on sound principles by persons of proved integrity."

The book under review will go a long way in enabling the readers to understand the principles, and the necessity of integrity.

The Land Acquisition Act: with Land Acquisition (Mines) Acts by *Mahim Chandra Sarkar*, 3rd Edition by *Mr. S. O. C. Sarkar* and published by *Messrs. M. C. Sarkar and Sons*, Calcutta, 1927 Edition; Over 250 pp: Price Rs. 4.

The fact that the commentary has undergone the third edition is a sufficient proof of its popularity and of the need of the book. All the important changes introduced in the Land Acquisition Act by the Legislature and all the decisions by the Courts on the Act have been noticed in the book. Indeed the additions and alterations have made this edition almost a different work from the previous edition. The rules framed by the various authorities under the Act have also been included. The printing and the get-up are unusually remarkable, the paper used being feather-weight.

The Punjab Pre-emption Act by *Ratan Lal Gupta*, Advocate, Ambala City, Second Edition and published by *The University, Book Agency*, Kutchery Road, Lahore—1926 Edition: Over 400 pp: Price Rs. 7.

This second edition has been needed within a short period of only two years and the opportunity has been taken to give in the beginning the two Acts one of 1913 and the other of 1905, for convenience of reference. Professedly the commentary deals with the Punjab-Pre-emption Act (1 of 1913) but the Allahabad High Court rulings too having been referred to in appropriate places, the profession in the United Provinces also will find the book useful on points which are similar. The printing and the get-up are all that can be desired.

THE ALL INDIA REPORTER

1927

JOURNAL SECTION

[April

PRECEDENTS

Privy Council decision is binding on all Indian Courts as soon as promulgated.

A. I. R. 1927 Bom. 157 (c)

Articles

EXECUTION PROCEEDINGS AND THE RIGHTS AND OBLIGATIONS OF LEGAL REPRESENTATIVES OF DECEASED PARTIES TO SUCH PROCEEDINGS.

(BY E. VINAYAKA ROW, B. A. B. L. VAKIL, HIGH COURT, MADRAS)

The decision of the Madras High Court in *Palaniappa Chettiar v Valliammai Achi* (1), raises a very important question of procedure in a rather startling manner. It has been the practice of our Courts to bring on the record of a pending execution petition the legal representatives of the deceased decree-holder or the deceased judgment-debtor and to proceed with the further stages of the pending execution petition. It was not seriously suggested in any reported case, so far as we are aware, that in view of the language of O. 21, R. 16 and S. 50 of the Code of Civil Procedure it is not open to the Court to bring on the record the legal representatives of the deceased party to a pending execution proceeding so as to enable the legal representative to continue the pending proceeding or to enable the decree-holder to continue the execution proceeding against the legal representatives of the deceased judgment-debtor so as to avoid complicated questions of limitation. Taking an extreme case we may put the point that has arisen in the following manner: Where

a decree is about to be time barred by reason of the 12 years rule and an execution petition is filed by the decree-holder on the last day of the 12 years period, and proceedings are conducted for some time and then the decree-holder dies, are not the legal representatives of the deceased decree-holder entitled to come on the record as the legal representatives of the decree-holder so as to enable them to continue the pending execution petition, thus depriving the judgment-debtor of the opportunity of pleading the 12 years bar? Similarly where an execution petition presented on the last day of the 12 years period is pending and the judgment-debtor dies, is it not open to the decree-holder to bring on the record the legal representatives of the deceased judgment-debtor so as to enable him to continue the pending execution petition against them without being met by the plea of limitation?

By a plausible construction of the terms of the statute the learned Judges of the Madras High Court, who decided the case reported as *Palaniappa Chettiar v. Valliammai Achi* (1), have come to the

(1) *A. I. R. 1927 Mad. 184=50 Mad. 1.*

conclusion that the questions propounded above should be answered in the negative. The hardship of the consequences of this conclusion is apparent. Apart from considerations of hardship, we have to examine whether, under the provisions of the Civil Procedure Code, as they now stand and which the Courts are bound to administer the conclusion arrived at by their Lordships is inevitable.

We may take it that the facts of that case, so far as they are relevant for the present purpose are these: A simple money decree was obtained by one J D against P on 17-1-1912. One M S obtained, an assignment of that decree on 17-10-16 and the assignment was recognized and at his instance certain execution proceedings were conducted but without realizing any amount. The said M S filed an application for execution of the decree on 17-1-1924 in the High Court, the decree of 1912 being passed by the High Court. In 1917, by reason of the proceedings taken by M S, adverted to above M S had a fresh period of 12 years from 1917. For the present let us leave out of our consideration those proceedings although we feel that the learned Judges were to a certain extent influenced by this factor though there is nothing to show in the judgment itself that their Lordships were so influenced. We may also take it for the purpose of this article that the application by M S dated 17-1-1924, was really the application presented on the last day of the 12 years period. During the pendency of this application M S died. His widow and sole legal representative filed an application to the High Court praying that she should be brought on the record in the execution petition filed by her husband M S on 17-1-1924, as his legal representative and that she should be permitted to continue the further prosecution of the said execution petition. Her application was rejected by the learned Judge who was sitting on the Original Side to dispose of such matters. Against that decision the judgment-debtors appealed under the Letters Patent and the matter came before a Bench of the Madras High Court. The judgment-debtor's plea before the Bench was that under the terms of O. 21, R. 16 it is no doubt open to the transferee by operation of law to apply for execution of the decree to the Court which passed

it; but that she cannot apply to come on the record so as to continue a pending execution petition. In other words O. 21, R. 16 contemplates that the legal representative of a deceased decree-holder is competent to file a fresh execution petition but not continue of a pending execution petition. On behalf of the judgment-debtors it was also contended that with the exception of O. 21, R. 16 there is no other provision in the Code of Civil Procedure to justify the order passed by the learned single Judge. It was argued that the provisions of O. 22 will not apply by reason of the express rule laid down in O. 22, R. 12 to the effect that nothing in Rules 3, 4 and 8 of O. 22 shall apply to proceedings in execution of a decree or order. It was also urged that S. 146 of the Code of Civil Procedure does not authorize substitution in a pending proceeding but speaks only of "taking proceedings" or "making an application."

It was argued on behalf of the legal representative of the decree-holder that S. 146 and O. 22, R. 10 apply to proceedings and that by the combined effect of O. 21, R. 16 and S. 146 a decree-holder's legal representative can apply to continue an execution petition filed by the deceased decree-holder as the words "may apply" mean and connote "may apply by a fresh application" or "may apply to continue a pending applications after substitution of legal representatives"

It was also urged relying upon the observations of the Full Bench case of the Madras High Court, reported as *Muthia Chettiar v. Govinddoss-Krishna-doss* (2), that where there is a right a remedy ought to be provided, and that if there is no specific provision in the Civil Procedure Code it is the duty of the Court under S. 151 to invent a procedure so that the existing rights may be given effect to, without being defeated by the accident of the death of the person who is in charge of the proceeding. Their Lordships accepted the arguments put forward on behalf of the judgment-debtors in preference to the reasoning put forward on behalf of the legal representative of the deceased decree-holder. As the reasoning of their Lordships may be said to apply with equal force to the case of a judgment-debtor dying and substitu-

(2) [1921] 44 Mad. 919=41 M. L. J. 816=14 L. W. 287=1921 M. W. N. 649.

tion of the names of his legal representatives being attempted the question has assumed very great importance. If the reasoning adopted by their Lordships has to be accepted as sound, no time should be lost to get the statute amended suitably by invoking in that behalf the rule making powers of the High Court or the powers of the Legislature to the extent that may be necessary. If, however, as a result of an examination of the reasoning of their Lordships there is any doubt about the correctness of the decision, in view of the importance of the subject it is necessary to have the authoritative pronouncement of a Full Bench upon the question at the earliest possible opportunity.

Their Lordships say: "We have no doubt question must be answered by reference to the specific terms of the Code of Civil Procedure". We would only urge that S. 151 has also to be considered in deciding whether where there is no positive prohibition it is not open to the Court *ex debito justitiae* to invent a procedure if necessary to give full effect to substantive rights devolving by operation of law upon legal representatives. We do not find anywhere in their Lordships' judgment an answer to the question why S. 151 should not be resorted to, to permit a substitution of names in a pending execution proceeding especially when there is nothing in the enacted rules prohibiting the same. It has been held by the Judicial Committee in more than one case that where the provisions of the Code of Civil Procedure are defective or incomplete, it is the duty of the Court to proceed upon the general principles of law even in matters of procedure where the Civil P. C., is silent. We may refer to the decisions of the Judicial Committee in *Ram Kirpal v. Rup Kuari* (3), *Hook v. Administrator-General of Bengal* (4) and *Ramachandra Row v. Ramachandra Row* (5). If it can be decided that S. 11 of the Civil P. C., is not exhaustive and where a matter is not dealt with by S. 11 it is the duty of the Court to apply the general principles of law, we see no reason why it is not open to the Court to apply general principles of law in a proper

case where O. 21, R. 16 is found to be inadequate or ineffective to safeguard substantive legal rights. S. 151 of the Code is specially enacted to empower the Courts to act, if necessary, beyond the four corners of the statute in matters where the statute is silent so as to promote the ends of justice. It is the inherent power and correspondingly the duty of every Court of justice to do justice and to see that justice does not fail by reason of any gaps in the statute laying down merely rules of procedure and not rules of law. In *Sabitri v. Savi* (6), their Lordships of the Judicial Committee recognized that under S. 151, Civil P. C. the inherent powers of the Court are saved in matters where they are required to secure the ends of justice. The Allahabad High Court held in *Durga Dihal Doss v. Anoraji* (7), that where there was no section of the Code of Civil Procedure strictly applicable to the circumstances of that case, the Court was warranted *ex debito justitiae* in passing the necessary orders on the general principles of law so as to promote the ends of justice. The opinions of Woodroffe and Mookerjee JJ., expressed in *Hukumchand Bold v. Kamalanand Singh* (8), are even more pronounced on this question. Their Lordships refer to their decision in *Panchanan Singh Roy v. Dwarkanath Roy* (9), and state that the provisions of the Civil P. C. cannot be treated as exhaustive. Mookerjee, J., observed:

I entirely repudiate the theory that our powers are rigidly circumscribed by the provisions of the Code and that we have no power to make a particular order though it may be absolutely essential in the interests of justice, unless some section of the Code can be pointed out as a direct authority for it.....It may be added that the exercise by Courts, of what are called their inherent powers or incidental powers is familiar in other systems of law and such exercise is justified on the ground that it is necessary to make its ordinary exercise of jurisdiction effectual because when jurisdiction has once attached it continues necessarily and all the powers requisite to give it full and complete effect can be exercised until the end of the law shall be attained.

To the same effect are the observations of their Lordships in *Jogendra Chandra Sen v. Wazi Dummisa Khatun* (10). In

(3) [1884] 6 All. 269=11 I. A. 37 (P.C.).

(4) A. I. R. 1921 P. C. 1=48 Cal. 499=48 I. A. 187.

(5) A. I. R. 1922 P. C. 280=45 Mad. 320=49 I. A. 129.

(6) A. I. R. 1921 P. C. 80=48 Cal. 481 (P. C.).

(7) [1894] 17 All. 29=(1894) A. W. N. 190.

(8) [1905] 33 Cal. 927=3 C. L. J. 67.

(9) [1906] 3 C. L. J. 29.

(10) [1907] 34 Cal. 860=11 C. W. N. 856.

Kabiruddin Mondal v. Entaj Mondal (11), the Calcutta High Court went further and held that the inherent power of the Court as vested in it by its own constitution is not limited to Ss. 151 and 152, Civil P. C. The same view of the inherent power of the Court was taken by the Allahabad High Court in *Har-nand Lal v. Chathurbhuj* (12).

Before we leave this part of the case we may as well point out the argument that is ordinarily pressed against the above view of the inherent powers of the Court. Reliance is placed on the doctrine of *expressio unius est exclusio alterius* to support the view that where the Code deals with a particular matter in a particular manner it must be deemed to be exhaustive and that it is not open to invoke the provisions of S. 151 in opposition to that provision. We may refer to *Vadappalli Varadacharyulu v. Khadavilli Narasimhacharyulu* (13), as an instance in point. For other instances of the application of this doctrine we may refer to the following cases *Neelaveni v. Narayana Reddi* (14), *Krishnasamy Naidu v. Chengalraya Naidu* (15), *Harihar Prasad Narain Deo v. Maheswari Prasad Narain Deo* (16), *Anant Potdar v. Mangal Potdar* (17), *Joshi Shib Prak. s'i v. Jhing Guria* (18), *Tota Ram v. Panna Lal* (19), *Thakuri Gope v. Malik Mokhtar Ahmad* (20). This group of cases does not lay down anything more than the obvious proposition that where a particular procedure is prescribed by the statute it is certainly not open to the Court to act contrary to the statutory provision by purporting to act under the inherent powers of the Court which are saved by S. 151. This is a proposition which is perfectly sound and if we may say so with respect, even these cases point out the distinction between the cases where there is a particular provision for doing a particular thing and the case where there is no such provision. Even these cases lay down the rule that where

the Civil P. C. is silent on a particular point the Court has to act under the inherent powers it possesses to the extent to which it is necessary to secure the ends of justice.

We have dwelt at some length on this aspect of the question, as we have grave doubts about the correctness of the view expressed by their Lordships in the sentence

"We have no doubt that the question must be answered by a reference to the specific terms of the Code of Civil Procedure if it is thereby intended that S. 151 Civil P. C., should be altogether ignored."

If this aspect of the inherent powers of the Court had been pressed before their Lordships and if their Lordships had dealt with the matter in their judgment we are not sure if they would not have decided otherwise in exercise of their inherent powers.

After a casual reference to S. 146, which according to their Lordships is inconclusive they come to the conclusion that they cannot accept the argument that because O. 21, R. 16 allows one method of proceeding with execution it excludes any other method. They then observe that for an answer to the question raised it was necessary to go to O. 22. With very great respect we are constrained to state that it is not quite so necessary to go to O. 22. It is quite possible to have recourse to the inherent powers of the Court under S. 151 and draw upon O. 22 only by way of analogy and not for being relied upon in terms. It is no doubt correct to say that O. 22, Rr. 3 and 4 can be so interpreted as to bring execution proceedings also within the terms thereof by construing the word "suit" so as to embrace execution proceedings. But unfortunately the language of O. 22 R. 12 makes it quite clear that nothing in Rr. 3, 4 and 8 shall apply to proceedings in execution of a decree or order. One may well feel with justification that what was meant by R. 12 was to declare that the disability of abatement contained in O. 22 R. 3, Cl. 2, and O. 22 R. 4, Cl. 3, shall not be held to apply to execution proceedings, as to do so will be obviously unjust. But unfortunately the words employed in R. 12 are very general and must be held to exclude the operation of Rr. 3 and 4 in the case of execution proceedings. The result is that under O. 22 there is no

(11) A. I. R. 1925 Cal. 420.

(12) A. I. R. 1926 All. 212=48 All. 356.

(13) A. I. R. 1926 Mad. 258.

(14) [1920] 43 Mad. 94=37 M. L. J. 599=10 L. W. 603=(1920) M. W. N. 19=53 I.C. 847=26 M. L. T. 377 (F.B.).

(15) A. I. R. 1924 Mad. 114=47 Mad. 171.

(16) A. I. R. 1925 Patna 47=3 Pat. 654.

(17) A. I. R. 1926 Pat. 27=4 Pat. 704.

(18) A. I. R. 1924 All. 446=46 All. 144.

(19) A. I. R. 1924 All. 688=46 All. 631.

(20) A. I. R. 1922 Patna 563.

procedure for the substitution of legal representatives in execution proceedings. The legal representatives in execution proceedings cannot avail themselves of O. 22, R. 10 on the ground that there is a devolution of interest by operation of law as the opening words of the rule, namely "In other cases of assignment etc." literally exclude from its purview devolution of interest by death as the cases of death have been dealt with in the rules prior to rule 10.

The cases on this part of the subject are very few and the reasoning in those cases is by no means so full as one would wish. But as precedents of longstanding on a matter of procedure they are entitled to much weight on the principle of *stare decisis*. The earliest case on the subject is that of the Bombay High Court, *Kalyanbhai Dipchand v. Ghan-shamlal Jadunathji* (21). This case which is strictly in point has not been noticed by their Lordships in *Palaniappa Chettiar v. Valliammai Achi* (1). In the Bombay case a decree-holder filed an execution application which was suspended by an injunction order and after certain other proceedings the injunction was dissolved and the execution proceeding was free to go on. During the subsistence of the injunction the decree-holder had died and after the dissolution of the injunction when it was open to the decree-holder's legal representative to apply to continue the execution application filed by his predecessor-in-interest which was then pending, the said legal representative applied for the substitution of his name as the legal representative in the pending execution application and sought to continue the execution proceedings. The argument deals with two positions; in the first place his right to have his name substituted as the representative of the decree-holder in the execution petition and in the second place his right to continue the execution petition. In view of the terms of S. 232 of Act X of 1877 which corresponded to O. 21, R. 16 of the new Code, it was argued in that case:

That the only course open to the decree-holder's representative was to make an application for execution in the manner prescribed in S. 232 of Act X of 1877.

This argument was, however, overruled by their Lordships. Even the

Madras High Court took the same view of the language of S. 232 of the old Code in *Srinivasa Iyengar v. Dharni Mudaly* (22). Their Lordships said:

In C. M. S. A. No. 88 of 1906 it was pointed out that there is nothing in S. 232 to prohibit an application by a transferee-decree-holder for an order to bring on record the representatives of the judgment-debtor, and we are unable to hold that the application made in this case by the legal representative of the decree-holder for an order recognising him as the decree-holder is prohibited by the Code.

In this case there does not seem to have been even a prayer for execution so as to bring it within the language of S. 232. The Judicial Commissioner's Court of Nagpur in *Mt. Krishna Bai v. Devi Singh* (23), has expressly held that the right to apply for execution under O. 21, R. 16, includes the right to carry on an execution already initiated by the deceased decree-holder. The Calcutta High Court observed in *Dwarbuksh Sircar v. Fatik Jali* (24) that in the case of an assignment pending proceedings in execution taken by the decree-holder, there is nothing in the Code which debars the Court from recognizing the transferee as the person to go on with the execution. Devolution by assignment in writing or devolution by operation of law stand on the same footing so far as the language of O. 21, R. 16, goes. It may be, therefore, stated that 26 Calcutta 250 is a very high authority for the proposition more explicitly laid down in A. I. R. 1923 Nagpur 195 as stated *supra*. The decision of the Patna High Court in *Mt. Bhagwanta Kuar v. Zamir Ahmad Khan* (25) lends support to the same view.

The point was raised and decided more explicitly by the Calcutta High Court in *Manmotha Nath Mitter v. Rakhal Chandra Tewary* (26). Their Lordships say:

With reference to the first point taken on behalf of the appellant it is necessary to mention that the learned District Judge has held that when a decree has been transferred by assignment in writing or by operation of law, from the decree-holder to another person, the transferee is bound under S. 232 to present a fresh application for execution and that it is not competent to him to ask for leave to proceed with the execution previously initiated by the transferrer and actually pending at the time. In our

(22) [1907] 17 M. L. J. 475.

(23) A. I. R. 1923 Nag. 195.

(24) [1899] 26 Cal. 250=3 C. W. N. 222.

(25) A. I. R. 1924 Pat. 576=3 Pat. 596.

(26) [1910] 14 C. W. N. 752=3 I. C. 324=10 C. L. J. 396.

(21) [1880] 5 Bom. 29.

opinion, this view cannot be supported What, therefore, the assignee of the decree, has to do is to apply for leave to the Court to execute the decree or to carry on the execution then pending at the instance of the assignor. This is also the practice which is followed in England under O. 42, R. 23, of the Rules of the Supreme Court.

The Full Bench of the Madras High Court in *Muthiah Chettiar v. Lodd Govinda Doss* (2) expressly followed the view expressed in 26 *Calcutta* 250 and held that no distinction should be made between the institution of execution proceedings and the continuation of such proceedings already begun by the assignor decree-holder which are still pending. Kumaraswami Sastry, J., at page 932 of the report observes:

The words of S. 146, which are very general, do not prohibit this and so long as there is nothing in O. 21, Rr. 15 and 16, cutting down the right, S. 151 will empower the Court to grant relief by applying principles analogous to Rr. 15 and 16 and give him relief even assuming that the rule would not in terms apply. Where rights are conferred by the sections of the Code and no provision is made for a particular set of facts, I think Courts ought to apply the provisions of the rules which are nearest in point, with such modifications as may be necessary, and not refuse relief on the ground that the Legislature has not made provision for a particular case, though within the generality of a section of the Code. The object of S. 151 is to give such power to Courts and to prevent a failure of justice.

If we may say so, with the greatest respect, the decisions in 14 *Calcutta Weekly Notes* 752 and 44 *Madras* 919 are really clinching. In *Palaniappa Chettiar v. Valliammai Achi* (1) their Lordships attempt to distinguish the Full Bench decision in *Muthiah Chettiar v. Lodd Govinddoss Krishnadoss* (2). They do not meet the observations of Kumaraswami Sastry, J., and the opinion of the other learned Judges. The case in 14 *C. W. N.* 752 is not even referred to. The point is not whether O. 22, R. 10, will justify the case of a devolution by a death being brought under O. 22, R. 10. The point is whether assuming that O. 22, R. 10, does not apply and O. 22, Rr. 3 and 4, do not apply, it is not open to the Court to follow the analogy of these rules to give relief in a manner

which is not prohibited by law. The argument that the words "may apply in O. 21, R. 16" should be interpreted to mean "may apply to continue" has not been also met.

The words employed in S. 146 are also in *pari materia*. If in cases arising in S. 146 the words "the proceeding may be taken or the application may be made" have been interpreted by Courts as meaning the continuation of a proceeding already taken or an application already made, we respectfully submit that the same reasoning will justify a similar interpretation in the case of O. 21, R. 16, in favour of the decree-holder's representative continuing a pending execution petition instead of being compelled to come in by way of a fresh execution petition with the risk of being met by an obvious plea of limitation. The following are the cases where such an interpretation has been adopted or explicitly approved.

N. Viswanatha Sastry v. Sitalakshimi Ammal (27); *Radhakrishna Ayyar v. P. Srinivasa Ayyar* (28) and *Beti Jeo v. Sham Bihari Lal* (29).

With great respect to the learned Judges who decided *Palaniappa Chettiar v. Valliammai Achi* (1) we feel constrained to observe that the reasoning adopted by their Lordships has not convinced us about the correctness of the conclusion. In view of the aforesaid weighty judicial pronouncements, which have not been adverted to by their Lordships we hope that when the opportunity presents itself next time a Division Bench or a Full Bench of the Madras High Court will find it possible to reconsider the question. We venture to express the hope that in the meanwhile the other superior Courts will examine the matter more fully before accepting the authority of *Palaniappa Chettiar v. Valliammai Achi* (1).

(27) [1921] M. W. N. 181=61 I. O. 979=18 L. W. 87.

(28) A. I. R. 1926 Mad. 578.

(29) [1907] 29 All. 574=(1907) A. W. N. 176=4 A. L. J. 480.

Adjournments under S. 526 (8) Criminal Procedure Code

We expressed the hope at page 5 of the Journal portion of the January 1927 issue that the question of the correctness of the ruling in *A. I. R. 1926 Sind*, page 137 (*King-Emperor v. Nattoman*) will be considered by a fuller Bench. The following letter from the gentleman who criticized the judgment will show that the above ruling has been interpreted to bring it in conformity with the general trend of rulings in the whole of India.

A Criticle Note

Since the publication of my *Critical Note* on the Sind Judicial Commissioner's Court's decision of *Nathomal v. Emperor* (20 S. L. R. 54=*A. I. R. 1926 Sind*, page 137), on the above subject, in *A. I. R. 1927*, Journal section, page 5, and other newspapers, I have had the pleasure to notice a ruling of the same Court, in the case of *Jatoi v. Emperor*, reported in *A. I. R. 1926 Sind*, page 288, holding the view contrary to that pronounced in the ruling commented upon.

The presiding Judge, Mr. Rupchand Bilaram, Additional Judicial Commissioner, holds in most clear terms that

the Court *is bound to adjourn* the case unless he was *bona fide* satisfied that the applicant had no intention to make an application for the transfer,

while the previous ruling commented on by me had held that the Court *was not bound to postpone unless satisfied that the applicant had a real and a bona-fide intention to get the case transferred.*

The comparison of both the learned Judges' decisions pronounced on different occasions will satisfy the readers that the positions taken up by both the Benches are contrary to each other's. The judgment of Mr. Rupchand Bilaram happily

coincides with the line of my argument to some extent; however, I would anxiously await the handling of the question at the hands of a fuller Bench at an early date; more so, as the decision reported in 20 S. L. R. 54=*A. I. R. 1926 Sind* 137 is opposed to the very letter of the law.

When Dr. Desouza's and Mr. Kennedy's above ruling was being issued in the districts of Sukkur and Larkhans (Sind) as a circular judgment, it was reasonably apprehended that it would very likely be misunderstood by the sub-magistracy, and it is no wonder to me to find that an occasion did actually arise very near to us quite soon thereafter, but the welcome decision of Mr. Rupchand has arrived at an opportune time, though not published as yet in the *Sind Law Reporter*. The learned Judge remarks at page 290 of the report, *A. I. R. 1926 Sind* 288,

that the learned Magistrate has not properly appreciated the effect of the recent ruling of *Nathomal v. Emperor*, *A. I. R. 1926 Sind* 137,"

and he finally ordered the transfer of the case mainly on the ground of the Magistrate's refusal of the applicant's prayer under S. 526, sub-Cl. 8, Criminal P. C.

In view of the two above decisions of different Benches of the Sind Judicial Commissioner's Court, one not over-ruling the other, as well as in the view of justice and uniformity, an authoritative decision of the Full Bench is earnestly sought for and the above-mentioned circular judgment to be re-called if it has not been done so heretofore.

District Court Pleaders } Rochaldoss
Chambers } Karamchand
Sukker (Sind) D/-24-1-27 } Pleader Sukkur.

Reviews

All-India Point Noted Index of Cases Judicially Noticed, 1811-1926

By MR. BALWANTRAI R. DESAI,
High Court Pleader, Place Road Baroda;
Ninth Edition, 1927-over 2000 pp.—
Price Rs. 15.

The system of arranging the Index according to names of cases could have

never been successful in India where the spellings of names cannot be fixed. An index, therefore, based upon volume and page system was bound to supplant the nominal index and Mr Desai has proved this fact. The popularity of the work under review is indicated by the work going through over eight editions in the short space of 21 years since 1905 when

the first edition was published and more particularly by the fact that there has been so far no other book dealing on the same lines. All the parallel references to journals, where a particular case is referred to, are given for facility of reference so that readers who may not have one particular report may be able to refer to some other available journal where the same case may have been reported. This the author has consciously done though the bulk has consequently increased, but the utility has not been sacrificed. Though the type used is bold the printing and the get-up are not uniformly all that can be desired which is probably due to the hurry with which the book has been rushed through.

The Discourses on the Purva Mimamsa System

By MR. P. B. SATHE, B.A., LL.M., M. R. A. S.,
Amraoti—1927 Edition—Over 40 pp.

This tiny book of less than 45 pages gives in a refreshing way what ponderous volumes may perhaps have failed to do. Mimamsa, as popularly understood, is a science of interpreting Vedic texts and in reality, however, the range of this science is almost co-extensive with human life. And still the science has been neglected probably because the narrower interpretation was popularly put upon it. The science is useful to an ordinary man in life to a Yajnika, to a Vaidika, to a Yojaman, to a lawyer, to the Judge and practically to every human being. What grammar is to language so is the science of Mimamsa to human conduct. Notwithstanding, however, the persistent statements of the Privy Council that the questions arising on Hindu Law must depend for their decision on the rules of interpretation framed by its own law-givers and recognized by its founders, *e. g.* *Ramchandra v. Vinayak* [1914] 42 Cal.334=25 I.C. 290=41 I.A. 290(P.C.) the legal profession in India has not yet fully appreciated the importance of this science. A cursory perusal of this short brochure will amply reward the labour.

Medico-Legal Court Companion

By MAJOR H. W. V. COX, I. S. O. I. M.D.,
and published by Messrs. *Eastern Law House*, Law Publishers, Calcutta—1927
Edition—Over 600 pp., Price Rs. 7-8-0.

It is well known that a lawyer has to be conversant not only with the law as popularly understood but with several branches of human knowledge. Without such knowledge the lawyer cannot effectually help the administration of justice. Unfortunately, however, the difficulties in the way of an exhaustive study are often very great in the absence of handy volumes, since bulky volumes cannot be easily gone through within the short space of time available to a busy practitioner. As the author has aptly remarked it is but very often that an expert witness whether dealing with handwriting or finger-impressions or the subject of medical jurisprudence almost always goes unchallenged and neither the Magistrate nor the lawyer is in a position to satisfy himself as to the truth of the statement made by the expert. It is but rarely that the honest but inaccurate statements or the dishonest and corrupt testimony of the expert witness is severely challenged and truth brought out clearly. This book will indeed remove the long-felt want.

The Chapters on Rape and Insanity contain more matters than are usually found in the bigger text books on medical jurisprudence and will help the medical witness as much as the lawyer and Judge in arriving at the truth. The Chapter on Insanity deals also with the detection of malingering, a subject of no small importance. Quotations from judgments have been given apart from references to the cases where the quotations were found to be necessary.

Part II contains valuable information in the form of aphorisms under various heads alphabetically arranged for easy reference, even a cursory review of which will reveal the vast store of information. The general get-up maintains the standard of the publications of the Eastern Law House.

THE ALL INDIA REPORTER

JOURNAL SECTION

1927]

May

ARTICLES

Circumstantial Evidence in a Murder Case.

(By N. Devaresa Kamath, B.A.B.L., High Court Vakil, Trivandrum.)

The decision reported in A. I. R. 1926 Allahabad 737, deserves more than a passing notice.

The facts of the case as seen from the judgment are that a daughter with her parents and husband lived in a certain house. The husband was found dead at night. The other three persons were prosecuted on a charge punishable under S. 301 and 211, I. P. C.

The Sessions Judge acquitted all the accused. Government appealed.

There is no direct evidence in the case.

The evidence is, as far as seen from the report as, follows:

1. The accused hid the corpse to save themselves.

2. The accused persistently lied in an attempt to account for the absence of the deceased.

3. They showed signs of fear on seeing the police.

4. That one Hoti Lal a Brahmin witness saw the wife picking dhatura seed from some shrubs in the village.

5. The woman was of loose disposition.

6. Some undigested rice was found in the stomach of the deceased.

7. A confession made to a mukhia (a person in authority) by one of the accused on the assurance that "the mukhia would do his best to help him."

From items 1 to 5 of the evidence and "the natural presumptions which arise with respect to an Indian family" their Lordships Walsh and Pullan, JJ., came to the conclusion that the wife had murdered her husband, and sentenced her to be hanged by the neck until she be dead, but about the other two, the parents, although there was some doubt

as to their complicity in the murder yet "upon their subsequent conduct, the lies which the father told, the undoubted fact that they concealed the death, buried the corpse and showed great signs of fear and uneasiness before the constable" they were found guilty of abetment of murder and sentenced to transportation for life.

The confession recorded by the mukhia, a person in authority, on the assurance "that he would do his best to help him" is clearly irrelevant in the case under S. 24 of the Evidence Act and S. 163 Criminal Procedure Code.

It has often-times been repeated by eminent Judges that in criminal trials it is the duty of the Court to refuse to convict unless the evidence is such as to prove the guilt of the accused beyond all reasonable doubt. The following sentence from Sir Elija Impey's charge to the jury in the famous Nundkurnar case is relevant. "But in capital cases as there can be nothing of equal value to life you must be thoroughly convinced that there does not remain a possibility of innocence before you give a verdict against the prisoner. In all criminal cases especially in cases of circumstantial evidence there must not be any possibility of explaining the matter except by assuming the accused is guilty." Is that the case here? There are several possible ways of explanation. The first three items of evidence detailed above (if true) would only show that the accused were afraid as anybody would be under the circumstances. Picking dhatura seed may be for medicinal purposes. The loose disposition of the wife might itself have induced the husband to commit suicide.

To say from the above evidence that an irresistible presumption arises of the guilt of the accused is to strike at the very root of criminal law. Are these circumstances incompatible with the presumption that the deceased took poison himself (if indeed there was poison inside the body as I see no reference to medical testimony in the case although their Lordships 'speculate' on the undigested rice found in the stomach of the deceased)?

Another "violent presumption" which their Lordships draw from their knowledge of Indian life is that the wife usually serves the husband during the evening meal. "The wife has never denied, if indeed she has not admitted, that she did in fact serve, if not prepare, the evening meal." Even presuming, since she has not denied it, that she had served the evening meal the violent presumption does not arise that she murdered the husband.

The whole judgment rings with the fallacious notion that it is the duty of the accused to explain matters and it is this absence of explanation that has visited upon them this sentence. Their Lordships have overlooked the principle

that it is the duty of the prosecution to prove their case beyond all reasonable doubt.

Another dictum of their Lordships in the same judgment is that in a case where there is evidence that among the two or three persons accused there is the murderer and the rest are abettors, and there is no evidence which of these is the murderer we are to convict all for murder. Their Lordships have refused to follow two of the Allahabad decisions where the contrary is held.

I must think that the Sessions Judge was correct in having acquitted all the accused. I am only surprised to see their Lordships with vast experience in English Criminal Law, where the broad principle that even if 99 guilty people escape, one innocent man should not be convicted, is accepted, deliver such a judgment. Perhaps their Lordships might have had a moral conviction of the guilt of the accused. But moral convictions ought not to influence judgments of a Court of law especially when the sentence is death and no reparation can be made if after some time the innocence of the accused comes to light.

BASIS OF INCOME-TAX TAXATION

Income of the Joint Family and the aggregate sum of the Incomes of the Members of the Joint Family

By E. S. Sunda, B. A., B. L., Vakil, MADURA.

A superficial reading of the title of the article would indicate that it does not mean any distinction: even if there is one, it is without difference. That impression is wholly wrong. Strict practicalism leads to those difficult situations, which the Income-tax Authorities and the assesses belonging to joint family have to face almost daily.

To be plainer: I shall state a case with a concrete example. A, B, and C are members of a joint undivided Hindu family. One is employed as an officer in the port trust at Madras, another a teacher in one of the Madras High Schools and the last is a beginner in the lawyer's profession. A is paid Rs. 70 a month, B gets Rs. 80 a month and C makes up in his profession Rs. 100. All the three live in a family house which may fetch a monthly rental of Rs. 50.

From the above figures A, B and C are not individually liable to pay income-tax as every member's income is below

Rs. 2,000 a year. Even if a portion of the income from the joint family house property is included, it does not make anybody liable. The questions that crop up in these situations are:

(i) Can the income of A, B and C be added together, and can the aggregate income or added income of the members of the joint Hindu family be taxed?

(ii) Can it be taken as a basis at all. Can it be legally one both under the Income-tax law and the Hindu Law?

(iii) Can any portion of the income of joint Hindu family property be added on to the income of any member of a joint Hindu family to make him liable?

(iv) If so what is the provision?

These questions are not very easy to answer with chapter and verse though they appear simple. I may state at the outset that the Legislature has definitely stated that a 'person' under the Income-tax Act includes a Hindu undivided family and it is assessable

as such on the basis of the income from the joint Hindu family property, its profession its everything, provided it is joint and done by the family as such. This may include say a joint family trade, any joint family business where the funds of the joint family are utilized and where the assets of the family are the fountain source of the income and where the income is received as the result of the joint enterprise of all the members of the joint family or of one on behalf of all the rest but with their willingness and silent co-operation. The joint family can be said to run a business of engineers if the family runs an engineering firm, of jewellers if it is a jewellery firm. So also business, etc.

The idea of a conjoint action on the part of the family is important as it will be seen subsequently and it has nothing to do with the individual avocation of individual members of a joint Hindu family. We have instances of all the members having their own salaried jobs but still running a joint family concern, one of the members attending to the business by turns. Still the income which one receives as salary, or from his individual exertion in any way is different and distinguishable from the income of the Hindu family earned by the family as such from and through a joint enterprise run by all or one on behalf of all. So the income of a single member can be and ought to be separately thought of.

The next question is whether the incomes of several individuals all fold, i.e. the aggregate sum, can be called the income of the joint family. The answer is an emphatic "no" on these grounds:

(i) The joint family as such cannot be a pleader, a clerk or an officer. It can have no job, no salary and as such the income of the individual person is different from that of the joint family.

(ii) For the purpose of the Income-Tax Act, an undivided Hindu family is a person.

(iii) It is the person—one person—that is taxed under the Income-Tax Act and not incomes of persons put together.

(iv) The Income tax Act has made the undivided family a separate entity and for the purposes of assessment it is considered separately as distinct from its component parts. So also the income which the family, as such, gets cannot be

portioned out by shares and be added on to the individual income of each member to make him liable. If the annual income of a member comes to Rs. 1,900, a share of his joint family income which may come to Rs. 250 cannot be added on to his income to make him liable. If the individual as such and the joint family income (without division) as such are both unassessable, it cannot be made liable by any processes like these. As different entities they escape.

(v) Another question apparently difficult crops up. Suppose the abovesaid A, B and C live together and we shall assume that they also put their individual incomes together for running on the family at a less cost. Will the putting in of the several incomes of several members of the family make it the income of the family to bring it under the purview of the assessing clause of the I. T. Act. I submit that this putting in of the several incomes will not be and will not make the incomes, an income of the joint family. Because under Hindu Law, if A, B and C receive their incomes from their different avocations and throw them into the common stock, it becomes the property of the joint Hindu family: *Lala Bahadur v. Kanaiya Lal* (1). Similar cases are *Gopalsami v. Chinnaswami* (2), *Tottempudi v. Tottempudi* (3), and that property becomes subject to all the incidents of joint Hindu family property. I want to insist on the fact that the putting in of the incomes makes the aggregate sum a property and not an income of the joint family. According to the I. T. Act, property is not taxed but the income. So the aggregate sum can never be called an income for the purposes of the assessment.

I am prepared to grant that if the aggregate sum (i. e., made of the incomes) is, say, lent out on interest, the accruing interest can be said to be the income of the joint family. So the distinction between the income from the joint family funds should be distinguished from the incomes which are unassessable by themselves but which may go to make up the joint family fund which may yield an income. The source should not be confused with the result.

(1) [1907] 29 All. 244=34 I. A. 65=4 A. L. J. 227 (P. C.).

(2) [1884] 7 Mad. 458.

(3) [1901] 27 Mad. 228.

Another important point is who receives the income. It is the lawyer, the clerk and the officer in the said cases in their personal capacity and not on behalf of the joint family. The person who earns the income is different from the person of the joint family.

I would make the position clear. Suppose these A, B, C live in three separate towns in spite of the fact that they continue to be members of a joint Hindu family. Then the I. T. Authorities will assess A, B, C, separately and A, B, C, will be declared unassessable easily without any doubt at all. Here in this case because they run a joint mess, live together, dine together (we shall grant even throw their individual income together), can these facts, under any circumstances, make the individual incomes, the income of the joint family. They cannot.

A joint mess and joint living do not constitute by themselves in Hindu Law a joint family. Will a divided family, because of these features become a joint family in Hindu Law for purposes of assessment? I state this to show how unreliable this line of argument is.

My view stated above is shared by Mr. A. V. Viswanatha Sastri (author of "Law and Practice of Income-tax") in page 36 of his book. If each of the members of a joint family receives his salary say of less than Rs. 2,000 a year, the salaries cannot be aggregated so as to make the joint family liable. For it is the individual and not the undivided family that earns the salary and the tax on salary is deducted by the person responsible for its payment under S. 18 of the Act. This argument holds good for other sources of income also.

A word about the intention of the Legislature though it may not be a legal argument. If A, B, C can be taxed on their aggregate income is it not placing a premium on division in the joint Hindu family? I shall not pause for an answer. Equitably too when one person, not a member of a joint Hindu family, is privileged to earn up to Rs. 2,000 without paying any assessment, should a person of a joint family be taxed because his brother members of the family also earn a similar sum? That cannot be. This will involve the question of proportionate increase also in the amount limit. We cannot imagine that the legislators never contemplated a case of the members of a joint family earning more than Rs. 2,000 in aggregate. If they had done so, and if they meant that such a family was liable for assessment they would have stated that such aggregate incomes shall be taxed, say on a proportionate scale depending on the number of the earning members of the family who make up the incomes. If three members earn, the amount limit will be raised to say Rs. 6,000, and if the income is over Rs. 6,000, the income (aggregate) may be taxed. From the absence of any such provision, we can also be sure that was not the intention of the Legislature, and the amounts of income earned by individuals can never be added together whether they live jointly or otherwise, much more so with the income of the family earned by the family as such. If we remember the unit that earns, and the fact that a unit alone and not units that can be taxed, much of the confused thinking will disappear.

Reviews

The Indian Police Act by Mr. P. Hari Rao, B. A., B. L., HIGH COURT VAKIL, MADRAS and published by the Author. Over 250 pp. 1927 Edition — Price Rs. 7-8-0.

The well known author of this book who has been connected with the various publications of the Law Printing House has maintained the standard of the exhaustiveness that one is accustomed to look to in their publications. Nothing connected with the Act, its

previous history and the subsequent amendments and changes has been omitted. The historical and critical introduction is prefixed to the work tracing the origin and development of the police law from authentic sources. A book like the one under review would be quite welcome when the public mind has been exercised on the subject of the powers and limitations of the police force.

THE ALL INDIA REPORTER

JOURNAL SECTION

1927]

[JUNE

ARTICLES

LAW *VERSUS* JUDICIAL DISCRETION

By Mr. Harish Chandra Mital, B. A., (Hons.), LL.B.,
Punjab Civil Service, Sub-Judge, also Advocate, High Court of
Judicature at Lahore ; Arnold Medalist of the University of the Punjab, etc.

" One of the most valuable principles pervading jurisprudence is that that judge is best who relies as little as possible on his own opinion." "

A knowledge of legal history is indispensable in forming a correct estimate of the utility and facility of a system of written law as exists at the present day in the civilised part of the world. That, however, is outside the scope of the present article. Suffice it to say that in India at any rate the British system of clear-cut, well-defined, written law has proved to be something unique in the history of its people. Before the advent of the British rule the law that had prevailed in this country for thousands of years did not consist of a Code or even any definitely laid down principles. There was not much of certainty about the result that was to follow to an individual member of society who acted in a certain untoward manner. Much depended upon who the victim of the act was, more upon who the aggressor was, and most upon who the Judge or the Kazi was. Even the strongest advocate of the old order of things is constrained to admit that justice between any and every two parties was not uniform in those days. In point of fact justice

always varied with the special circumstances of every case. It would be a far more serious matter, for example, for an humble citizen to assault a nobleman or a courtier than if the position were reversed. But the chief feature of the pre-modern system of law, which altogether distinguishes it from the system that exists to-day, is that while under the old system law was mostly another name for the discretion of the sovereign or of his deputies, under the present system the law of the land consists of a body of established rules and principles, mostly embodied in Codes and Acts which are placed in black and white on the Statute Books of India. These rules are alike binding on the sovereign and the subject, on the nobleman and the beggar, on the jailor and the prisoner in jail, on the Judge and the accused in the dock. A modern Judge (who has taken the place of the older Kazi) sits in his seat to administer justice not according to his own ideas of what is just or unjust

* The American Law Review, Vol. LIX, Part 6, pp. 897 & 899.

but according to certain fixed rules and principles. In this age of automatic machinery taking the place of human agency in all departments of life is it strange that the ingenuity of the civilised men should have also constructed a big machinery of law so that justice is now administered not by the whims of a human being but as if by machinery. Work the machinery whenever the need arises and the result that will follow will be the same. In other words the product will be uniform. Murder a fellow-being and you shall be hanged, be you prince or peasant. Commit theft or arson and a prescribed consequence shall follow, no matter who you are and who the aggrieved party is. To administer the law for a Judge at the present day is, or at least should be, merely to solve a problem of mathematics. If two are added to two the result is four. If a dacoity is committed by a person the result is transportation or imprisonment as prescribed definitely. The man sitting as a Judge has to gather the facts of the case—and that too in accordance with prescribed rules, *vide* that master-piece of codification, the Indian Evidence Act—and then to apply the law to those facts almost as a school boy applies a formula to his problem of Algebra or Euclid, and the result is thus obtained. The law that has to be applied to the facts is not an uncertain thing but a hard, uniform, and reliable body of formulæ. The wide and unfettered discretion vested in the Kazi—whether it was exercised by him according to his conscience or whether, as was more often the case, he used his whimsicalities in place of his conscience—has disappeared yielding place to the conscience of the public as reflected in the laws of the realm. "That August tribunal (the people) is eternally sitting in judgment on the conduct of all public functionaries, and their judgments are recorded in public opinion." * And one may add that it is this public opinion which in every democratic country takes the form of its laws.

Even the small amount of discretion which the modern system of laws still leaves to the Judge is to be exercised by him not on his own behalf but on behalf of the community—he being only

a servant of the latter employed to carry out its will . . . It is to be exercised by him not in a whimsical or arbitrary manner but in accordance with well laid principles. There is not a case to which our codes and our case-law would not give a suitable reply, and the business of the Judge is only to find out that answer and announce the way he has reached at it, not only to the parties concerned but to the whole community who employ him to solve these problems on its behalf. In other words he must state his reasons for every decision that he has arrived at so that these reasons may be known to the whole society and nothing done in the dark. The legal rights of every individual are as safe as a balance in a Bank of England pass-book. If a judge falls in error in solving a problem he must be taken to task, the problem must be resolved again by a still more competent brain employed by the community as its agent—our appellate Courts—and justice done.

The chief characteristic which distinguishes human agency from the agency of Nature is that while a human being always acts differently at different times in response to the same stimulus and also differently in response to different stimulus. Nature is devoid of this element of variation. The same patting on the back of a friend by another friend produces the opposite results of jollity and anger according as the person patted is in a light or a serious mood. But the case is different with Nature, through which a given cause must produce a given result under given physical conditions because the object affected has no mental condition like that of a human being. In point of fact the object behind the gradual substitution of machinery for the agency of man has always been to give the same uniformity and certainty to the fruits of human endeavour as characterise the results of the activities of Nature. It is because human nature is always desirous of being sure and certain of obtaining sure and certain results by performing a given act that machinery is day by day taking up the place of man. Exactly the same truth is applicable in the domain of the administration of law. Human society has, after an experience of centuries upon centuries of tyrannical and arbitrary rule, substituted for the human Judge a most

* The American Law Review, Vol. LIX, Part 6, pp. 897 & 899.

elaborate and wonderful machinery of law, and though retaining the human Judge has reduced him to the position of only a working part of that great machine, with the necessary consequence that he must move the way the machine compels him to move instead of playing ducks and drakes—as his predecessor used to—with the life and property of other fellowmen. In this respect he is in the same position as a constitutional monarch. Any movement on his part which goes against the smooth working of the machine is sure to smash the machinery and before smashing the machinery smash himself.

Some people may no doubt entertain doubts and misgivings whether this attempt at the elimination of the personal or human factor from the sphere of administration of justice is calculated to give better justice to the people in every case. It is, however, forgotten that in order to judge of the benefits of any order of things we have always to consider not individual cases in which it may have worked harsh, but the largest number of cases extending over the longest possible period of time. In other words the test in such matters is not individual cases but the *summum bonum* of human existence which is the greatest good of the greatest number. Judged in this manner the elimination of the human factor has gone a long way towards creating an efficient administration of justice between man and man which may be said to be the corner-stone of modern civilisation. It is true that the world may not have even now reached the ideal in this respect. In fact this world and perfection, philosophers tell us, are contradictory terms, but there can be no doubt now about the ideal—administration of justice among human beings not according to the will of any one of them but by following in the footsteps of the automatically working Nature and by making the whole system as uniform, as self-operating, and bearing as much assured fruits as she herself.

Now, the question which naturally arises is whether this process of the substitution of fixed rules laid down in black and white and made to act like a piece of machinery in place of the free-will of a human being has attained completion or whether it is still capable of extension. Metaphysics tells us that everything in this world tends towards perfection but

can never actually attain it so long as it is in and of this world. The actual attainment of the ideal has been kept for another world. Such being the case, to claim that the modern system of legal administration even approximates to perfection is a condemnable piece of hypocrisy and self-deception doing no good either to the lawyer or to the layman. It would on the other hand smother all progress. The only reasonable and sincere attitude for a man of common-sense, who is called upon to defend the present system is to admit frankly that there is still a great scope for progress. At present we have got statutes to serve as the skeleton or the framework of the system, we have got a most voluminous and almost unmanageable body of bye-laws, rules, and case-law enfleshing the skeleton, and this great and growing body composed of statutes and bye-laws, of rules and rulings, is even now in a position to reply to almost every query put to it, to cut the loaf clear between two contesting persons and thus put an end to the dispute whenever called upon so to do. It is haunted by no fear. It can be accused of no favour. Nor can be there any grumbling on the part of any of the parties as there would certainly be if, as it formerly used to be, law were only another name for the sweet will of an individual who more frequently than not, suffered from some of the greatest failings of which a human being is capable, and yet occupying a raised seat, looked upon himself as the embodiment of justice. Oh! how slowly has the world realised that justice and human will are two opposite and irreconcilable things. While the former is eternal and unchangeable the latter is change personified, as err it must though the error may be now towards this side, now towards that.

There are two directions so far as we can see in which the present system of judicial administration can and must progress in order to approach the goal still more. In the first place *the process of substitution of the machinery of law in place of human will referred to above should advance as much as possible towards completion. In other words our codes and our case-law should multiply to such an extent as to exhaust all situations that are likely to occur.* There should remain hardly a legal problem which can not be solved by a formula of either codi-

fied or case law and so there should crop up hardly a case in which a third human being has to use his free will to decide a dispute between two others with the consequent grumbling and heart-burning on the one side or the other. Secondly—and this is of even greater importance than the first,—we should so improve the human beings whom we employ to work this gigantic machinery of the law—our Judges—that *they should get the whole work performable by the machinery performed by it* instead of stealthily adding anything of their own hand manufacture. They should be men who can rule out all personal opinions, pre-possessions, and whimsicalities, who can subdue all inclinations towards egotism and autocracy, and who know more how to work the machinery than how to work themselves. Let them strictly administer the law as it is—healthy or impolitic it is not their concern. Let them for the time being sit like dumb stones whose only business is to set the machinery in motion and hand over to their masters—the community—the manufactured product as it is. If the product is faulty they are not to blame. The machine may be requiring the touch of a repairing or improving hand, but it is no business of theirs to meddle with it, otherwise they make matters worse. Let the master himself engage a repairer or an inventor. Let some non-official Member or the Law Department of the State approach the Legislature for the remedy.

"Yes, but justice tempered with mercy and not cool and calculated justice is humanity after," cries out the voice of conscience. Doubtlessly true. But for the sake of the purity and virtue of both justice and mercy let us first separate and distinguish between the two and then worship both. It is confusing between the two that produces evil results. One hopes one is not wrong in saying that many a modern Judge profess to administer justice while they are in reality dispensing mercy. Let them continue dispensing it provided they say it out expressly and honestly so as to prevent misleading the Courts of appeal, the public, and last but not least the accused himself. Let us hear from the mouth of the Judge himself that **X** is legally liable to punishment **A** but in mercy for his tender years or for his previous good re-

cord he is being awarded punishment **B**. Let us clearly know in every case the line where justice ends and mercy begins. It is the overlapping of the former by the latter that throws dust in the eyes of the community.

From the politics point of view it is clear that there cannot be two sovereigns in a land, no more than two swords can rest in the same scabbard. If, therefore, the judiciary were to claim the sovereignty which the legislature alone might claim according to constitution, like that of Great Britain, there is bound to be a double government in the land with all the intolerable results of such a system. In the British Constitution the sovereignty of the Parliament has never been challenged and the judiciary has no business except to enforce the law as it is. Dicey has for the sake of emphasis illustrated it by saying that if tomorrow the British Parliament were to pass a law that all the blue-eyed children in England were to be murdered the Courts in England will have no authority to question the validity of such a diabolical piece of legislation and will have to administer it as it is. Even in a country like India where the Courts have the power to question the authority of the Indian and Provincial legislatures, though not that of the British Parliament, (for the simple reason that the legislatures, in this country only exercise powers delegated to them by the British Parliament and are not sovereign law-making bodies) the cases in which this power is to be called into use are very few and far between. [See e. g., *Lee v. Lee* (1).]

If the judiciary of a country were only to realise its exact position in relation to the other departments of the body politic many of the errors in which it may be falling every day would be avoided. We would then hear no more talk of the judiciary lagging behind other departments of the State in the efficient discharge of its duties. No more would be the charge levelled against the Judges that they claim too much but give too little of service to the people, that they always think more in terms of their rights than in terms of their duties and obligations. Taking the example of the two of the most efficient departments of the State does, any officer of the Postal

(1) A. I. R. 1924 Lah. 513=5 Lah. 147 (F.B.)

or Railway Departments ever bring to bear his own notions of right and wrong, good and bad, desirable and undesirable, in the discharge of his duties? If a late-coming passenger is missing the train does the Station Master stop to take mercy on him because of certain special circumstances in his case or does he twist the law to benefit him. Nay, he only acts as a single part in a great machine bound to obey the movements allotted to it and no more. He minds his own business and does not go out of his own sphere to encroach on another. Similar is the case with the post-master. And what is the result? Everybody can see it for himself any day. The Post Office and the Railway are the two departments of the State both in India and in England who in efficiency lead the rest. Indeed the British Post Office has been rightly called the most complicated and at the same time the most efficiently working organisation in the whole world.

Speaking of India in particular one is constrained to think that the misconception with regard to the exact function of the judiciary which has unfortunately been so common both among Judges (especially the lower grades of them) and among the public has its basis in the deep-rooted ideas and notions of the Indian people with regard to the institution of the judiciary. Before the advent of British rule there was neither law nor legislature—the King and the kazi being everything.

In most cases the King himself performed the judicial functions but, whether it was he himself or his subordinate, the person so sitting as a Judge or a Magistrate knew no limits to his authority. Do as he may please he ran no risk of overstepping the boundary of his sphere. It is these deep-rooted but unfortunate notions that have always made judicial posts so attractive and coveted in India, and though the circumstances have altogether changed since our coming in contact with the West the mentality still continues in spite of it. There you have a clear instance of different national mentalities. In England judicial service is looked upon as a career of useful public service. In India it is looked upon as an opportunity for lording over our fellowmen. For an average British youth a judicial appointment has no special charm placing it in a class different from

others as his only look-out is for a job in which he can be of the greatest service to himself and his country—be it in any department of the State whatsoever, the military included. In India an average young man is so often seen talking about the charms of a munsifship or a magistracy even where low paid that he would often prefer it to a more highly paid job in another department. It is due to this unfortunate and slavish mentality that the subordinate judiciary in India is far less efficient in the performance of its proper function, far less cognizant of the limits of its proper sphere, far more eager to neglect, 'its own business and mind others', far more ignorant of its position of duty and service in the interests of its masters—the community,—and far more prone to introduce personal notions and prepossessions in public business than is any other service or department of the State.

The one-sided and sometimes both-sided bitterness which judicial decisions generally leave behind may also be attributed to the same cause. When a party finds the tribunal not merely collecting and sifting the facts of the case and applying the law *as it is*—that is what alone it is expected to do—but taking an active private interest in the matter and bringing its own notions and prejudices to bear on the decision of the case, he at once, not altogether without justification, takes an adverse decision as the work of the individual or individuals constituting the tribunal rather than as the fruit of his own deeds. If the tribunal were only to act as the guard, the engine driver or any other officer of the railway acts, the result of its decisions would be looked upon with the same equanimity as the acts of the latter. In fact the parties would always consider it as the inevitable physical consequence of their own deeds harbouring no bitterness towards any. In fact the decision would produce the same mutual satisfaction, the same toleration for the inevitable, and the same faith in one's own doing as, for example, the missing of a train by a passenger. The latter does not sit down to fret as he would have certainly done if the station master or the guard had intentionally and maliciously started it before time. On the other hand his only look out now is to catch the next train

Similar is the case with judicial decisions. Under an ideal judicial system for the administration of the laws of the land a party would take an adverse verdict not as coming from the individual who happens to be the Judge but from the huge and impersonal machinery of law, even more gigantic, complicated, and awe-inspiring than our railway systems. Without feeling resentment against anyone he would give up the matter as a bad investment, stop throwing good money after bad in protracted litigations in which personalities come in more than principles, and employ his energies in fresh productive endeavour. And there can be no doubt that both he and the society would be much better off in the end like the passenger who immediately caught the next train, without waiting behind to quarrel with the station master. Oh, for that day when our Courts would learn to act in the same uniform automatic, and natural manner as the great railway systems of the land, and with the same happy results.

This is in substance what the theory of law implies. In other words this is what law in theory, though unfortunately not in practice, is. An ideal administration of law cannot but be a mere mechanical application of the rules of law. The bringing in of private opinions and ideas is bound to spell disaster and to thwart the designed working of the whole machine. It is much better and safer for humanity to concede candidly that an administration or a reign of unmixed and absolute *justice* is impossible for it in this imperfect world. That is the lesson of human history all the world over. The son of Adam is by nature incapable of attaining to the idea of perfect justice. The most that he can hope to achieve, especially in an Iron Age, is the nearest approximation to it, the administration and reign of *law*. We have been fed up with the cant and hypocrisy of the administration of "*justice*." We want something more possible and practical, an administration of law.

Nor is the theory of the Bar divorced from the theory of the Bench as discussed above. They must have a very poor estimate of the institution of the Bar who think that the business of a counsel is similar to that of a juggler, to make falsehood appear as truth and vice versa. Legal practitioners are not in theory and

ought not to be in practice mere hirelings of rogues and cheats. They do not stand in a Court of law in order to identify their own conscience with the evil conscience of guilty parties and to protect them from the 'clutches' of justice. No idea could be baser or more undignified. To think in that way is an outrage on one of the most learned and honourable institutions in the body politic of any civilised State.

"There is a vague popular belief", said that great lawyer Abraham Lincoln, that lawyers are necessarily dishonest I say "vague" because when we consider to what extent confidence and honors are reposed in and conferred upon lawyers by the people, it appears improbable that their impression of dishonesty is very distinct and vivid; yet the impression is common, almost universal. Let no youngman, using the law for a calling, for a moment yield to the popular belief Resolve to be honest at all events, and if in your judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation rather than one in the choosing of which you do in advance consent to be a knave.

By accepting a retainer a counsel does not promise to sell or lend his conscience to his client. The only function and duty of an advocate—and it is an honourable duty essential in any civilized society—is to see that all the legal rights of his client are respected, that so far as his client is affected all the requirements of the law are strictly complied with by the Court, all the material facts are collected in a manner authorized by law, and that after thus satisfying all the requirements of the law of procedure, proper substantive law is applied to those facts under proper interpretation. Apart from this professional interest he is not to take any private interest in his client's case. If, for example, he coaches him or his witnesses to say what they would not otherwise say, or if he intentionally misleads the Court, he is going astray from the path of professional morality. A lawyer's business is to expound law and not to thwart its administration. Nor is he to teach men the material advantages of being a liar and the inconvenience of telling the truth.

Two babies are fighting for a single cake. X is the person appointed to take hold of it and dispose of it between them in an impartial and just manner. X decides it according to his own ideas of justice and fairness. Afterwards Y is appointed to dispose of an exactly similar dispute. He decides it according to his

own ideas. And so on and so forth. There is, so to suppose, no definite rule as to how the cake is to be cut and distributed between the two little squabblers.

This has exactly been the history of the human race. After this state of affairs had gone on for centuries upon centuries it was felt that this constant variation and uncertainty was the greatest enemy of justice. Civilized humanity began to treat such administration with sheer contempt for the simple reason that it depended wholly and solely upon that least permanent and trustworthy guide in the world, the human will. Nobody was sure of the results—good or bad—of his actions. A lucky fellow may after perpetrating a hellish crime escape scot-free while another unfortunate individual may curse the "Judge" who straight-away pronounced his innocence to be guilt. Now stepped in the better sense of civilized human society. "Thus far and no further" said it in a stern and decisive tone. No more was the human will to be the arbiter between human beings. Human actions were to be judged by humanity as natural events are judged by nature, with the consequence that the results of the former were to be as uniform, as mechanical, and as trustworthy as those of the latter. There was to be a law applicable to human actions as there is the law of nature, equally changeless, equally unchangeable. The cake was to be cut according to fixed rules and divided between the children so as to leave no heart-burning behind. The awards of human tribunals were to be taken by both the parties with the same self-satisfaction, patience, and resignation as any result from the working of a natural law, say, the hurt caused by a stone falling or the damage caused by rain and storm. Human free-will—a most unreliable agent in such matters—was to be eliminated and eliminated for ever.

The only ideal attitude for a Judge is to try to do the utmost justice according to his best conscience and taking into consideration all the circumstances of the particular case, provided as follows :

(1) He takes as his guide a strict compliance with the statutory laws of the land taken together with the rules, orders, notifications, circulars etc., framed or published under powers given.

(2) He also strictly follows all authoritatively laid down well-settled principles of non-statutory law (e. g., Hindu law).

(3) He stifles the small amount of freedom yet left to him after observing (1) and (2) above by strictly following the case-law established authoritatively up to date unless a particular view is overruled by competent authority (including himself if competent to do so.)

An attitude like this is not only conducive to the best interests of the community which a Judge is called upon to serve but is also the most convenient and reliable for himself. Symbolically it may be described by saying that *provided he strictly keeps himself confined within the circle outlined by statute law, well-settled principles of non-statutory law, and the case-law* he is to try to do justice according to the best of his conscience. He is to be as good a boy as possible provided only in his goodness he does not break open on any side the fortress in which he has been purposely interned—the fortress whose walls are the laws of the land, otherwise he would be doing immensely more harm and disservice to society than the good that he perhaps intends doing to the parties before him. Not that he is to banish out all human feelings or to ignore the peculiar circumstances of each particular case. To take a concrete instance mercy is in many cases as necessary a dispensation as justice. Tempering justice with mercy is like blending gold with copper. In both cases the result is greater strength and more reliability. But loyalty to and worship of the goddess of Mercy is to be always subordinated to that for the god of Law.

This aspect of the matter is unfortunately least understood by the subordinate judiciary in this country and in this matter as in so many others two extremes meet. In spite of the fact that the fortress of our Codes and case-law gives our Judges a very wide range over which they can move without the need of breaking open its four walls there are some who every now and then are breaking them in order to assert their individual conscience and judgment. On the other hand there are those who in ardently worshipping the fortress make so much of the limitations placed on them by its four walls that they forget the ample space left

within which they can utilise for exercising their best conscience and judgment. The result is that the former are ignoring the best conscience and judgment of the whole community (as embodied in the law of the land) and in attempting to act according to their own individual conscience and judgment follow the "penny wise, pound foolish" policy. They take up a frail, wavering guide giving up a mighty one with the result that justice misdirected comes to grief. The latter, on the other hand, have not as yet learnt to avail of the wide space within the great fortress for the free movement of their limbs, the result here being no less a misfortune, because justice is kept intact in the pocket of the Judge rather than dispensed to the needy. It may be remarked in passing that the latter is a far more common disease in India and is lamentable in a country where the Courts of law and equity are the same. To mention only one instance of daily occurrence in our Subordinate Courts in India the Judge feels convinced of the veracity of an oral statement by a party or a witness, it strikes his conscience to be the whole truth of the matter, and

yet he decides the other way. The reason at the bottom is that he finds it far more convenient to rely upon a documentary piece of evidence—say a receipt, but in order to justify and flatter himself he draws in his mind a distinction between 'private or moral conviction' and 'judicial conviction,' a distinction as foolish and as ignorant, as unknown to any system of jurisprudence. A Judge is as much within his rights to rely on oral statements and ignore the 'black and white' as he is in acting the other way provided he is really convinced of the honesty of the statement—a conviction worth the name being always 'moral.' 'Judicial conviction,' if understood as something in contraposition to moral conviction is not conviction but convenience, euphemistically so called. It has been so often said of Judge Holmes of the Supreme Court of the United States of America that he thinks always more in terms of human beings than in terms of documents.* The Subordinate Judiciary in India would do well to take a leaf from his book.

* The "Outlook" U. S. A.

Reviews

The Current Indian Statutes: Published quarterly by the *Manager*, "*Lahore Law Times*" Lahore :

This useful publication has been satisfactorily meeting a very important want of the legal profession for the last four years and the first part of the fifth volume which is now before us discloses some further improvements in this valuable publication. This publication contains all the notifications issued by the Government of India and the statutes passed by the Parliament in England relating to matters concerning India and the Government of India Acts passed by the Central Legislature. The importance to the legal profession of having up-to-date information about the various amendments made in the statute law of the country need not be elaborated. This publication, in addition to giving to the profession latest amendments in the statute law within the

shortest possible time gives in the shape of notes useful information about the case law or the discussions that led up to particular amendments. For example the very important Act called the Indian Registration Amendment Act (Act 2 of 1927) which received the assent of the Governor-General on 18-2-1927 nullifying the effect of the decision of the Privy Council in *Dyal Singh v. Indar Singh* (*All India Reporter* 1926 Privy Council 94) we find published in the part that is before us. The notes point out how the decision of the Privy Council in the said case was inconsistent with the interpretation of the Indian Courts and the practice prevailing in India all these years. The back volumes for the years 1923-26 are cloth bound and sold at Rs.4- per year. We have no doubt that with its increased usefulness by reason of the addition of notes this publication will be even more largely patronised by the profession.

THE ALL INDIA REPORTER

JOURNAL SECTION

1927]

[JULY

Articles

POSITION OF PURCHASER FROM OFFICIAL RECEIVER

Where property of a judgment-debtor is sold in Court auction in satisfaction of a decree the auction-purchaser can apply to the Court for delivery of the property purchased. If a third party obstructs delivery to the purchaser, the purchaser can apply to the Court under O. 21, R. 97 for removal of obstruction.

If a purchaser from the Official Receiver of properties belonging to the insolvent is obstructed by third party, can the purchaser apply for delivery of property after removing obstruction in a summary procedure similar to O. 21 R. 97, or does his remedy lie only in a regular suit?

The question first arose for consideration in *G. Narasimhaya v. Vēeraraghavalu* (1). In that case the purchaser from the Official Receiver attempted to take possession of the property purchased. Third party obstructed on the ground that he was the owner of the property. The insolvency Court acting under S. 47 of the old Provincial Insolvency Act (Act 3 of 1907) ordered delivery to the purchaser. The High Court in appeal held that the insolvency Court had no jurisdiction to pass such an order. The reasoning adopted by the High Court was that the provisions of S. 47 of Act 3 of 1907 corresponding to S. 5 of the new Act (Act 5 of 1920) did not apply to such cases, as there was no decree and as the sale by the Official Receiver was not a sale in execution of a decree.

The next case where the same point arose for consideration was *Maddipoti*

Peramma v. G. Krishnayya (2). The facts of this case were similar to those of the first case and here also it was held that the insolvency Court had no jurisdiction to pass an order for delivery to the purchaser from a person claiming title to that property.

The next case where the same point was considered is *Official Receiver, Tinnevely v. Shankarlinga* (3). Though Act 5 of 1920 came into force by that time, the case was decided under the old Provincial Insolvency Act. Seshagiri Iyer, J., therein considered the effect of the introduction of S. 4 in the new Act. His Lordship observes that "S. 4 of the present Act, i. e., Act 5 of 1920 should not be regarded as if for the first time a new power had been conferred." Thus according to the old Act the insolvency Court had no jurisdiction to decide questions of title between the insolvent and third parties. So that if a third person claims properties sold by the Official Receiver as belonging to the insolvent, the Official Receiver or the purchaser from him must be relegated to a regular suit.

Then came the new Provincial Insolvency Act (Act 5 of 1920). The above question came up for decision under the new Act in *A. I. R. 1922 Madras 147*. The High Court after reviewing the above cases held that the insolvency Court has got ample power to deal with questions arising between the estate of an insolvent and a third party. The previous cases were distinguished as having been decided under the old Insolvency

(1) [1917] 41 Mad. 440=6 L. W. 694=42 I. O. 525=(1917) M. W. N. 857.

1927 J/5 b/4 & 6a/4

(2) [1918] 8 M. L. W. 136=47 I. C. 308=(1918) M. W. N. 479.

(3) A. I. R. 1921 Mad. 204=44 Mad. 524.

Act. The reasoning adopted by their Lordships was that in the new Act S. 4 has been newly introduced; that S. 4 has been modelled on S. 7 of the Presidency Towns Insolvency Act (Act 3 of 1909). Under S. 7 of Act 3 of 1909 it has been held that the insolvency Court is vested with jurisdiction to decide all questions of title arising between Official Assignee and third parties: *Official Assignee v. Vadavalli Ammal* (4). As a similar section has been introduced into the new Provincial Insolvency Act, the insolvency Courts in the moffusil must be deemed to have jurisdiction to decide all questions of title arising between the Official Receiver or the purchaser from him and third parties.

In *A.I.R. 1924 Madras 387* (1) a Division Bench of the High Court has observed that S. 4 of Act 5 of 1920 is wide enough to enable an insolvency Court to adjudicate upon questions of title; but the power given by this section is subject to the provisions of the Act one of which is the proviso to S. 56 Cl. (3) which is in the way of a Court removing any person from the possession of property whom the insolvent has not a present right to remove. It is also observed therein that it would be a waste of time for the insolvency Court to engage in an enquiry into the question of title and the remedy of the Official Receiver lies in a regular suit.

The next case in which a similar point came up for decision is *A.I.R. 1926 Madras 363*. In that case the Official Receiver applied to the insolvency Court under S. 56 of the Act 5 of 1920 for possession of certain properties as belonging to the insolvent. The insolvency Court purporting to act under S. 56, Cl. 3 ordered delivery of the property to the Official Receiver. On appeal their Lordships of the Madras High Court held that under S. 56, Cl. (3) of Act 5 of 1920 an order cannot be passed against persons who claim adversely to the insolvent. The insolvency Court cannot direct any person to deliver up property to the Official Receiver unless the insolvent is entitled on the date of such application, to the possession of such property. If a title however flimsy is set up by the person in possession the insolvency Court cannot act under S. 56.

(4) [1917] 40 Mad. 810=36 I. O. 524=4 L.W.
425

The Court, however, may on a proper application being made under S. 4 of the Act, try the issue whether the insolvent is entitled to the property or not. But in order to enable the Court to do so, a proper application ought to be made under S. 4 and the other side should be asked to plead thereto.

Thus according to *A. I. R. 1922 Madras 147* when a purchaser from the Official Receiver is obstructed by a third party the insolvency Court has got ample jurisdiction to decide all questions of title as between the obstructor and the purchaser under Ss. 56 and 4: according to *A. I. R. 1924 Madras 387*, the trend of opinion is that S. 4 of the Act is controlled by the proviso to S. 56 Cl. 3. It is also observed therein that it would be a waste of time for the insolvency Court to adjudicate upon questions of title and that it would be expedient to have those questions decided in a regular suit. Again in *A. I. R. 1926 Madras 363* it has been held that where there is a clash of interest between the Official Receiver and a third party regarding some property alleged to be that of the insolvent the insolvency Court cannot act under S. 56, but may, on a proper application being made under S. 4 of Act 5 of 1920 try the issue whether the insolvent is entitled to the property or not.

Act 5 of 1920 has been amended by Act 29 of 1926 and it remains to be seen whether the amendment in any way affects the above question, viz., whether the insolvency Court can decide questions of title between the Official Receiver and third parties. According to the amending Act (Act 29 of 1926) a new section, S. 59 A has been introduced into the Provincial Insolvency Act (Act 5 of 1920). It has got three sub-clauses and all of them have been almost taken verbatim from S. 36, Cls. 1 to 3, of the Presidency Towns Insolvency Act (Act 3 of 1907.)

According to sub-Cl. (1) the insolvency Court has got power to summon before it any person having any property belonging to the insolvent or require information regarding the property of the insolvent from third persons suspected to be in possession of the same; according to Cl. (2) the Court can compel the attendance of such persons; according to Cl. (3) such persons may be examined by the Court. S. 36 of the Presidency

Towns Insolvency Act contains four more sub-clauses. Of these Cl. (5) is the most important for our purpose: for it contains provisions for delivery of property in the hands of third persons to the purchaser and it runs thus "If on the examination of any such persons the Court is satisfied that he has in his possession any such property belonging to the insolvent the Court may on the application of the official assignee order him to deliver that property to the official assignee and, etc." Sub-Cl. (6) says that orders passed under the above clause shall be executed in the same manner as decrees for delivery of property under the Code of Civil Procedure. So under that section a person who gets an order in his favour for delivery of property has got the summary remedies provided by O. 21, R. 97. Civil P. C.

The Legislature which saw the necessity to introduce almost verbatim sub-Ss. 1 to 3 of S. 36 of Act 3 of 1909 into Act 5 of 1920 has deliberately refrained from incorporating sub-S. 5 which deals with delivery of immovable property. The non-introduction of sub-Cl. 5 seems to lend colour to the view that the insolvency Court has no power to decide questions of title between Official Receiver and third parties in possession of properties alleged to be those of the insolvent. The remedy of the Official Receiver or of a purchaser from him seems to be in a regular suit. This view seems to be in consonance with the view expressed by Seshagiri Aiyer, J., in *Official Receiver of Tinnevely v. Shankaralinga* (3) wherein he has expressed the view that "S. 4 of the present Act should not be regarded as if for the first time a new power had been conferred" on the insolvency Court. No doubt this view has been brushed aside as being obiter in *A. I. R. 1922 Mad. 147*. Yet when we consider that sub-Cl. (5) of S. 36 which deals with delivery of possession of properties of the insolvent in the hands of third persons is deliberately omitted in the amending

Act (Act 29 of 1926), the necessary conclusion seems to be that when a third person is in possession of properties alleged to be of the insolvent the only course left open to the Official Receiver or to a purchaser from him is to establish his title by means of a regular suit if he is obstructed.

The view of the other High Courts seems to be that the insolvency Court has jurisdiction to enquire whether the property in possession of a third party and alleged by the Receiver to be the property of the insolvent is really so or not and if it finds that it is the property of the insolvent it can order its delivery to the Receiver: *Bansidhar v. Kharagjit* (5) and *Jagrup Sahu v. Ramananda Sahu* (6). These were decisions under the old Act (Act 3 of 1907) and even under the old Act the Allahabad High Court has held that the insolvency Courts had power to try the question of title between the Official Receiver and third parties. There are also similar decisions of the Punjab Chief Court reported in *Mahomed Umar v. Munshi Ram* (7). So under Cl. 5 of 1920 and after the introduction of S. 4 their view on the question would be an emphatic "Yes." But no decision on the question has been arrived at in any Court after the amendment of Act 5 of 1920 by Act 29 of 1926. And as a result of the amendment the object of the Legislature on the question seems to be as stated above that where a purchaser from the Official Receiver is obstructed by a third party the Insolvency Court has no jurisdiction to decide the question of title as between them, but they must be referred to a regular suit.

V. SRINIVASA AIYAR,
VAKIL, NEGAPATAM.

(5) [1915] 37 All. 65=26 I. C. 926=12 A. L. J. 1273.

(6) [1917] 39 All. 633=40 I. C. 373=15 A. L. J. 738.

(7) [1917] 54 P. R. 1917=41 I. C. 802=132 P. W. R. 1917.

Notes

Description of stamps to be used on promissory notes payable on demand *

Under S. 11 of the Stamp Act instruments chargeable with a duty of one anna may be stamped with adhesive stamps.

Rule 13 of the Indian Stamp Rules 1925 provides that instruments chargeable with a stamp duty under Art. 49 (a) (ii) (on demand promissory notes for amounts exceeding Rs. 250, but not exceeding Rs. 1,000) and 49 (a) (iii) (on demand promissory notes for amounts exceeding Rs. 1,000) may be stamped with adhesive stamps.

Rule 16 of the Indian Stamp Rules 1925, runs as follows :

Except as otherwise provided by these rules the adhesive stamps used to denote duty shall be the requisite number of stamps bearing the words 'Four Annas,' 'Two Annas,' 'One Anna' and 'Half Anna' and such stamps may be inscribed for use either for postage, or for revenue or for both postage and revenue.

The result is that promissory notes payable on demand may now be stamped by affixing the requisite number of stamps of the value of 'Four Annas,' 'Two Annas,' 'One Anna' and 'Half Anna' (but not one quarter-anna or stamps of any other value) and irrespective of whether they are inscribed for use for the purposes of postage or revenue or for both postage and revenue.

It is needless to say that the rules as to use of adhesive stamps on promissory notes are only enabling provisions and they do not take away the right to use impressed stamps as prescribed in R. 5 (Indian Stamp Rules 1925). Promissory notes may, therefore, also be written on paper on which the stamp of the proper value with or without the word 'Hundi' is engraved or embossed.

* See also *A. I. R. 1927 Journal P. 10.*

Indian Legislation in 1926.

The legislative activities of the Central Legislature in 1926 cannot be said to be of much importance from the point of view of the practising lawyer. However a brief survey of the legislation of the year will be helpful to our readers.

Civil Procedure.

Act I of 1926, by enacting suitable amendments of the Civil P. C. and the Provincial Small Cause Courts Act, has made it clear that Small Cause Courts functioning under Act IX of 1887, have no jurisdiction to order the attachment of immovable property, or to grant an injunction, or to direct the appointment of a receiver of immovable property or to pass the interlocutory orders referred to in Cl. (e) of S. 94, Civil P. C.

The next piece of legislation with reference to Civil Procedure is Act VI of 1926 amending S. 103 of the Civil P. C. so as to enable the High Court to determine any issue of fact even though determined by the lower appellate Court if the finding of the lower appellate Court is vitiated by any illegality, omission, error or defect as is referred to in S. 100, Civil P. C. This will enable the High

Court to dispose of finally a Second Appeal where findings of fact are set aside as being vitiated by errors in law without calling for revised findings by the lower appellate Court in the light of the remarks made in the preliminary judgment by the High Court.

The suggestion made by the Civil Justice Committee is given effect to and Act XXXI of 1926 is passed amending S. 68 of the Indian Evidence Act 1872, by providing that the execution of any document, not being a Will, need not be formally proved by the examination of an attesting witness if the document is duly registered unless the execution of the document by the person by whom it is alleged to have been executed is specifically denied.

Legal Practitioners.

The four Acts of the year relating to legal practitioners taken together form an important landmark in the history of the legal profession in India. The Indian Bar Councils Act (Act XXXVIII of 1926) cannot be said to be satisfactory and has been already dealt with in our columns. Though the Act was heralded with much

pomp the Act has not yet begun to work as the Law Member with the Government of India has not yet thought fit to put the lynch pins to the wheels. The Government of India notification which has to usher this Act into operation has not yet been passed although it was expected that the notification would be issued early in the year 1927. We are credibly informed that the bigotted worshippers of the dual system are creating trouble in the sanctum sanctorum of the Law Secretariat at Simla. The provisions of this Act ought to be now well known and there is no need to linger longer on this Act.

Act XV of 1926 amending the Legal Practitioners Act of 1879 with a view to put down the evil of touting is commendable. The Act defines who a tout is and makes touting an offence punishable with imprisonment which may extend to 3 months or with fine which may extend to Rs. 500 or with both. We hope the Bar Associations in the Country will have the wisdom to use effectively this piece of legislation to suppress the growing evil of touting.

The Legal Practitioners (Fees) Act of 1926 (Act XXI of 1926) must be also welcomed by the profession as it recognises the right of a legal practitioner who acts, to sue for recovery of fees due to him for professional services rendered. The amount of fees recoverable is defined to be the amount contracted for or in the absence of any contract the amount recoverable under the rules for the taxation of costs. The recognition of this right rightly involves the recognition of legal liability on the part of the practitioner who agrees to act, to discharge his duties without negligence. S. 5 recognises the right of the client to sue the practitioner for any loss or injury due to any negligence on the part of the latter in the conduct of his professional duties.

The amendments to Order III of the Civil P. C. relating to the practice of filing vakalats and memoranda of appearance by practitioners, made by Act XXII of 1926 should be also widely noticed. The amending Act recognises the status of a practitioner who is empowered only to plead but not to act in requiring from him only a memo. of appearance signed by himself and not by the party on whose behalf he is required to plead. The well-recognised practice of one

practitioner appearing for another practitioner at his request without any fresh writing has now received statutory approval. This may appear to be superfluous but for stray instances of Subordinate Judicial Officers abusing their discretion by insisting upon fresh vakalats in such cases also.

Criminal Procedure.

Act II of 1926, makes various minor amendments to Ss. 200, 202, 203 and 476 of the Code of Criminal Procedure. The amendments are formal and in some cases intended only to remedy the defects due to inartistic draftsmanship.

Act X of 1926 the second amending Act, amends S. 123 of the Criminal P. C. by empowering the Magistrate to direct rigorous imprisonment for failure to give security for good behaviour in cases under S. 109 of the Criminal P. C.

The third Amending Act (Act XXXVI of 1926) amending Ss. 99A, 99B, 99C, 99D and 99E brings within the same category as "seditious matter" the following viz., "any matter which promotes or is intended to promote feelings of enmity or hatred between different classes of His Majesty's subjects".

Of a quasi-criminal character is the Contempt of Courts Act (Act XII of 1926); which enables High Courts and Chief Courts to punish contempts of Courts subordinate to them. There was some difference of opinion as to the inherent powers of High Courts in this matter and the question is now made free from all doubts.

Hindu Wills (Attestation).

The Indian Succession (Amendment) Act 1926 (XXXVII of 1926) amends S. 57 of the Indian Succession Act 1925 in an important particular. Under the new law all wills and codicils made by any Hindu, Buddhist, Sikh, or Jain on or after the 1st day of January 1927 must be attested by two witnesses as required by S. 63 of the same Act.

Transfer of Property Act — Definition of attestation.

The many technical quibbles raised round the question of attestation are now set at rest by Act XXVII of 1926 which introduces in S. 3 of the T. P. Act an exhaustive definition of the term attestation. Under the amended T. P. Act, the word "attested," in relation to an instrument, means attested by two or more witnesses each of whom has seen the

executant sign or affix his mark, to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary.

Law of Insolvency.

Act IX of 1926 amends the Presidency Towns Insolvency Act by bringing Karachi and Rangoon as Presidency Towns within the purview of the Act.

The Provincial Insolvency (Amendment) Act (XXXIX of 1926) makes suitable provisions in the interests of the creditors of the Insolvent. It is now enacted that a creditor may apply for annulment of a transfer under S. 53 or S. 54 with the leave of the Court in the event of the receiver refusing to take the necessary steps. Provision is also made for appointing committees of inspection composed of creditors to inspect and supervise the work of the Receiver. Wider powers are conferred upon the Court and upon the receiver to call for any information and to summon and to secure the attendance of any witness that may be found necessary for eliciting information respecting the insolvent or his dealings or property.

Negotiable Instruments.

Act XI of 1926 validates pro-notes payable on demand for an amount exceeding Rs. 250, executed after the 30th day of September 1923 and before the 5th day of January 1925, but stamped with an adhesive stamp or stamps inscribed for postage only and not of the description recognized by the Indian Stamp Act, 1899.

Act XXX of 1926 makes amendments to S. 80 of the Negotiable Instruments Act and to O. 37, R. 2, Civil P. C. so as to enable Courts to award interest at 6 % p. a. on the amount payable under the instrument sued upon. Provision is also made for the award of interest subsequent to the institution of the suit and for the immediate execution of the decree passed under the summary procedure prescribed under O. 37.

Usurious Loans.

Act XXVIII of 1926 amends the Usurious Loans Act in two important particulars. Relief under the Usurious Loans Act can be now given in an action brought by the debtor for the redemption of any security. This brings the law into line with the English Law. The period for which the account can be re-opened is extended to 12 years instead of 6 years.

Devolution of Powers.

In pursuance of the recommendations of the Civil Justice Committee the legislature has provided for the lightening of the work of District Judges by devolution of powers.

Act IV of 1926 amends the Guardian and Wards Act by enacting that the High Court or the District Court may transfer any proceedings for disposal to any officer exercising original civil jurisdiction subordinate to a District Court.

Act XIII of 1926 provides that the Local Government may by notification declare that any Sub-Registrar named in the notification shall exercise the powers of a Registrar in certain matters.

Act XIV of 1926 similarly authorizes the High Court and the District Court to transfer to Subordinate Judge any proceedings under the Indian Succession Act, 1925.

Act XVIII of 1926 similarly amends the Madras Civil Courts Act, 1873 by enhancing the pecuniary jurisdictions of the Courts specified in S. 28 from Rs. 500 and Rs. 200 to Rs. 1,000 and Rs. 300 respectively.

Act XXXII of 1926 amends the Administrator-General's Act Ss. 9, 31 and 37 by substituting the figure Rs. 2,000 instead of Rs. 1,000 in those three sections.

Fiscal Acts.

Acts III, XVII, XIX, XXIV of 1926 are purely fiscal and need not be adverted to.

Miscellaneous.

The other enactments are of a miscellaneous character relating to technical matters or questions which cannot be of general interest to the busy lawyer. Among the more important of these Acts we may just mention the Indian Naturalisation Act (VII of 1926) the Indian Trade Unions Act (XVI of 1926) and the Indian Companies Amendment Act (XXXIII of 1926).

Reviews

The Indian Easements Act, by *Mr. Jyoti Prosad, B. A., B. Sc., LL.B., Vakil, High Court and Law Professor Agra College*: printed by the *Allahabad Law Journal Press, Allahabad*: 1927 Edition, over 150 pp.:

This tiny book of about 150 pages is mainly useful for the students preparing for the law examination of the Indian Universities for whom it is expressly prepared. The inclusion of the English Prescription Act and the material portions of the principal Indian Acts relating to easements is likely to prove somewhat useful to legal practitioners. The printing and get up is excellent.

The Law of Income-tax in India, by *V. S. Sundaram of the Indian Audit and Accounts Service, Secretary, Central Board of Revenue, Government of India*: published by Messrs. Butterworth and Co. Ltd., 6 Hastings Street, Calcutta: 1927 Edition, over 950 pp.: Price, Rs. 12.

The official connexion of the author with the Chief Income Tax Authority in India has led him to adopt as his model, as far as Indian conditions permit, the classic book of Dowell (who, by the way, belonged to the Inland Revenue in England) which has been published by the same publishers in England.

Unlike Dowell, however, the author has expressed his own views on matters over which there is a conflict of authority or, where there is no conflict, the authority is of doubtful weight. He has also stated the problems which have not yet been the subject of judicial pronouncement, or not yet arisen; and suggested solutions of such problems together with the pros and cons of the solutions offered. The official position of the author makes it necessary to emphasise that these views are his personal views only.

The special feature of this commentary is the inclusion of appendices which consist of a summary of changes in the law before 1886, the rates of tax under the earlier laws, a table of cross references between the present Act and the Acts since 1886, the text of the Acts of 1886 to 1920 and connected documents, the All-India Committee's Report of 1921

which is largely the basis of the amendment of the law in 1922, a summary of the Taxation Enquiry Committee's recommendations regarding income-tax, and extracts from the Civil Procedure Code.

Another special feature of this work is that rules and instructions under the Act are given under the respective sections for facility of reference. Wherever quotations from the relevant authorities are given they have been so fully given that in very few cases the original authorities need be referred to.

The danger of indiscriminate reliance upon English authorities is counteracted by pointing out the distinctions between the English and the Indian Acts. An exhaustive introduction specially distinguishing capital from income gives a summary of the present law with the previous history of the income-tax legislation in India and shows the main features of English and American law.

The Land Acquisition Act with the Land Acquisition (Mines) Act as amended up-to-date By *MR. A. GHOSH* AND PUBLISHED BY *MESSRS. EASTERN LAW HOUSE, LAW PUBLISHERS, 15 COLLEGE SQUARE, CALCUTTA*. Over pp. 350—1927 Edition—Price. Rs. 4.

Though the author calls this but a handy volume out of modesty, we are glad to say that this is a fairly exhaustive commentary on the Land Acquisition Act (1894) and also on the Land Acquisition (Mines) Act. All the relevant cases in India as well as in England have been pressed into service and indeed the result has been quite satisfactory. The author has not only not neglected the unauthorized reports, but has been bold to state that "though there is an aversion in some quarters to unauthorized reports, to me they have been sources of great information." The readers will thus find that they will get the whole law as interpreted not only in the official but also in the unofficial reports. The printing and the general get-up is excellent.

Handbook of Indian Company Law by *Solomon Judah, LL. B.*, ADVOCATE, HIGH COURT, BOMBAY and published by Messrs. Butterworth & Co. Ltd., 6 Hastings Street, Calcutta—Over 450 pp.—1927 Edition. Price Rs. 12.

This handbook truly serves the purpose of a handbook and is neither intended to be nor is a substitute for any of the voluminous commentaries on the Indian Company Law but is for the same reason very handy and convenient, for reference. The latest cases not only of the Indian Courts and of the Privy Council but also of the English Courts have been availed of in the interests of the legal profession. We hope that the members of the public having anything to do with limited companies will also find the book very useful.

The Motor Vehicles Act by *Nripendranath Dhar, B. L.*, VAKIL, HIGH COURT, CALCUTTA and published by Messrs. M. C. Sirkar & Sons, 90/2-A, Harrison Road, Calcutta—Over 150 pp. 1927 Edition. Price Rs. 2-8-0.

Motor has ceased to be a matter of luxury; it has already become a necessity not only in big cities but also in the far off villages. Motor accidents too have become more common and are to some extent an incidental and unavoidable evil. The author has given a short but a complete summary of the Act which will enable even a lay reader to realise his rights and liabilities.

It is little known even among lawyers that in case of nasty accidents, the persons injured have a remedy against the owner of the conveyance who is generally a man of substance. A perusal of the book will amply repay the labour. The rules by the Government of Bengal. U. P., Bombay and Madras form a useful appendix of the Act. The book is printed on antique paper.

The Legal Practitioners Act by *K. C. Chakravathy*, ADVOCATE, HIGH COURT, CALCUTTA and published by Messrs. M. C. Sirkar & Sons, 90/2-A, Harrison Road, Calcutta—Over 200 pp. 1927 Edition. Price Rs. 3-8-0.

This Second Edition of the Act will really serve a useful purpose. Owing mainly to the crowded state of the profession the conduct of the legal practi-

tioners has been the subject of judicial scrutiny and, we regret to confess, has been deservedly condemned. At the same time the legal practitioners as officers of the Court have rights and privileges which ought to be zealously safeguarded. However, this aspect has not unfortunately been sufficiently dealt with in the book under review; this is probably due to the fact that there are no decided cases on the point which alone are the main basis of the commentary for the author. This defect is however more than counter-balanced by the excellent introduction which throws a flood of light on the little known subject of the existence, position, duties and liabilities of legal practitioners during the Hindu and Mahomedan periods. Otherwise, too, the book is quite up-to-date, the printing and get up being quite satisfactory.

The Madras Religious Endowments Act (Act 11 of 1927) by *Mr. P. Ramanatha Aiyar* and published by the MADRAS LAW JOURNAL OFFICE, MYLAPORE, MADRAS—Over 400 pp. 1927 Edition. Price Rs. 3.

The heated controversy which was raged over this Act in its Bill stage is now almost over and the working of the Act will show the wisdom or otherwise of this legislation. In view of the extremely controversial nature, the Act is sure to come before the Courts for interpretation shortly and in the absence of prior interpretation on a similar subject, the Act would have been more difficult of interpretation were it not for the fact that the work under review would help the Bench and the Bar with its profuse citation of English precedents on the similar subject which is regulated by the English Charitable Trusts Act. The several appendices which give the Objects and Reasons, Report of the Select Committee, the Rules and Orders framed under the Act and the other allied provisions of the Indian Legislature are very useful. On the successful working of this Act will depend to a great extent, the introduction of similar Acts in the sister provinces. The printing and the get-up maintains the standard of the publications of the "Madras Law Journal" Office.

THE ALL INDIA REPORTER

JOURNAL SECTION

1927]

[AUGUST

NOTES & COMMENTS

INDIAN LEGISLATION—1927 ACTS—FIRST QUARTER.

Busy practitioners may not find time to wade through many pages of the Gazette to follow closely the legislative work of the Central Legislature in this country. We therefore propose to give in our columns a brief account of the legislative activities of the Central Legislature for each quarter of the year. For purposes of convenient reference we propose to deal with the Acts in the serial order of enactment.

Act 1 of 1927.—The Indian Limitation Amendment Act of 1927.—This is a very important piece of legislation which comes into force on the 1st day of January 1928. This Act is the outcome of the recommendations of the Civil Justice Committee. The provisions of this Act will, to a large extent, save the time of our trial Courts as the sections deal with often contested questions. S. 2 of this Act provides that the proviso to sub-S. 1 of S. 20 of the Indian Limitation Act 1908 shall be deleted and the following proviso shall be substituted in its place. The new proviso runs as follows :

"Provided that, save in the case of a payment of interest made before the 1st day of January 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment."

In respect of payment for principal or interest made subsequent to 1st of January 1928, unless there is a writing signed by the person making the payment, the payment cannot be relied upon to give a

fresh period of limitation. Hitherto alleged payments of interest, as such, without any writing, were frequently relied upon to give a fresh starting point. This led to much waste of judicial time in deciding the simple question of fact relating to the payment of interest. The change in the law should be made widely known so that the public may take care to obtain an acknowledgment in writing for part payment towards principal or for payment towards interest as such.

The third section of the Act relates to the amendment of the present S. 21 of the Limitation Act. To S. 21 of the Act the following third sub-section has been added namely :

"(3) for the purposes of the said sections—

(a) An acknowledgment signed, or a payment made, in respect of any liability, by, or by the duly authorised agent of, any widow or other limited owner of property who is governed by the Hindu law, shall be a valid acknowledgment or payment, as the case may be, as against a reversioner succeeding to such liability; and

(b) Where a liability has been incurred by, or on behalf of, a Hindu undivided family as such, an acknowledgment or payment made by, or by the duly authorised agent of, the Manager of the family for the time being shall be deemed to have been made on behalf of the whole family."

This amendment is very salutary in that it will save a good deal of judicial

time and will also lead to substantial justice in the case of persons dealing with Hindu widows and managers of joint Hindu families.

Section 4 of the new Amendment Act amends the explanation to Art. 132 by bringing the value of any agricultural or other produce, the right to receive which is secured by a charge upon immovable property, within the purview of the explanation. The same section amends Art. 166 of the Limitation Act by making that article applicable to applications by judgment-debtors under the Civil P. C. to set aside sales in execution of a decree. This amendment gives legislative recognition to the view taken by the Madras and Patna High Courts that Art. 166 is the article that should be applied in the case of an application for setting aside the sale whether under O. 21, R. 90 or under S. 47 of the Code of Civil Procedure.

Act 2 of 1927—the Registration Amendment Act.—This is a short Act of a declaratory character intended to amend sub-S. 2 of S. 17 by the insertion of the following explanation after Cl. (xii) namely :

"Explanation—A document purporting or operating to effect a contract for the

sale of immovable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money."

The view of the law taken by the Indian Courts all these years has been the same as what is now enacted by the explanation. But the Privy Council made a serious departure by their decision in *Dyal Singh v. Indar Singh* reported in *All India Reporter* 1926 P. C. page 94. The present amendment became inevitable to maintain uniformity in the Indian Law on the subject and we need hardly say that the present amendment nullifying the effect of the Privy Council decision is in promotion of the ends of justice and in consonance with the decisions of the Indian Courts all these years.

Act 3 of 1927—The Steel Industry Protection Act, 1927.—This is not of interest to lawyers.

Act 4 of 1927.—This Act makes certain amendments to the Indian Coinage Act and the Indian Paper Currency Act.

Articles

The Hindu Law Research and Reform Association.

"I think there ought to be such a School in connection with the Dharma Shastra in which the most important treatises on religious and Civil Law should be taught and the rules of interpretations given by the Mimanskars applied for the decision of legal points".

Dr. Sir R. C. Bhandarkar.

About two years, certain gentlemen interesting themselves in the subject of Hindu Law saw the necessity of popularizing the study of original works and making research and reform in Hindu Law and with that object started an

institution in the Bombay Presidency with Mr. M. R. Jayakar as its President. At a meeting of the Nagpur Philosophical Society held on February 19, 1926, at the Morris College, a similar committee for a similar purpose was also established in C. P. and Berar with the Hon'ble Mr. G. S. Khaparde, as Chairman. To encourage a proper study of the original texts on Hindu Law in accordance with the rules of interpretation, to help to reconcile the various schools of thought, to remedy the anomalies and contradictions now exist-

ing in the administration thereof such as the law of adoption, stridhan, succession and inheritance, to edit and publish translations of the original Sanskrit law texts and to make representations to the Indian Universities to introduce original works in the curricula of the LL. B. and LL. M. examinations were the objects which the founders of the committee had at heart. These committees did some work and created liking and taste for the subject and arrested attention of the law-loving public to the work. But not content with Provincial Societies only, some of the leading lawyers, advocates, Shastrees and Pandits, met at Poona under the chairmanship of Mr. Bhawani Shankar Niyogi, and started the Central Hindu Law Research and Reform Association with its headquarters at Poona.

Though mainly intended for co-ordinating the work of the provincial bodies the Central Association advocated a wider programme and defined the policy and principle which should govern the institutions. Inter alia, the aims and objects of the Association are :

1. To promote the study of original works on Hindu Law.

2. To examine judicial decisions and statutes affecting Hindus in the light of principles underlying the system of Hindu Law, which are to be determined by interpretation of texts and customs, according to the recognised canons of interpretation enunciated by the ancient Hindu Jurists.

3. To propose legislation with a view to rectify errors in the administration of Hindu Law, arising from departures from the true spirit of Hindu Law.

4. To propose introduction of changes not in direct conflict with the spirit of Hindu Law.

5. To take all steps conducive to the attainment of the aforesaid purposes.

It would not be out of place to mention here the necessity of starting such an institution. It is true that in spite of the changes brought about by the introduction of British regime, several matters are to be decided by the judicial authorities in accordance with the personal law of the parties and the various Acts and Regulations (such as the Government of India Act of 1915, the Bombay Regulation 4 of 1927) have helped to maintain and apply the per-

sonal law of the land to the parties concerned. It is on this account that Hindus attract the application of their own law in matters of inheritance and succession, marriage, religious institutions, adoption, partition, gifts, wills etc. But "large encroachments have been made on the old Hindu Law of the times of Nibandha writers" by Legislative enactments, such as Act 21 of 1850 (Freedom of Religion Act), the Hindu Wills Act (Act 21 of 1870), Transfer of Property Act (Act 4 of 1882), the Indian Majority Act (Act 16 of 1916). But these laws at least find their justification in the fact that Government or the Legislatures recognised the necessity of making avowed changes in the indigenous system to meet the growing needs of the day. But very large inroads have been made on Hindu law even by the Courts, which, while professing to apply old Hindu Law to modern Hindu Society have imperceptibly made innovations therein and strange results have followed. It must be frankly admitted, nay, definitely asserted, that the Courts have made very sincere and strenuous efforts to find out the true principles of Hindu Law and apply them to the cases before them. But from the beginning they were handicapped by several drawbacks. Barring a few noble exceptions (like Colebrooke and Sir George Knox) most of the Judges, even in superior Courts, were totally ignorant of the language in which the works on Hindu Law were composed. They had to rely upon translations. It was too readily assumed that a Judge could correctly lay down and administer law by reading translations of portions of a few Sanskrit works. In the early days of the British Administration of justice only three such translations existed, viz., Halhed's Gentoo Code, Sir William Jones' Translation of the Manusmriti and Colebrooke's translation of the Sanskrit Digest compiled by Jagannath. Besides these about half a dozen works were translated wholly or in part during the first half of the 17th century such as the Dayabhaga, the Vyavahara Mayukha, the Mitakshara, the Dattaka Mimamsa and the Datta Chandrika by Colebrook, Borradaile, Sutherland and others. It was after 1865 that a few more works were translated such as the Dharma Sutras in the Sacred Books of the East Series, a portion of the Smiriti Chandrika by

Krishnaswamy Iyer, the Vivada Chintamani by P. C. Tagore, a small portion of the Viramitrodaya by Sarkar. But this was only a fraction as compared with the vast mass of literature on the subjects, which a Judge, deciding complicated questions on law, is expected or required to know. Most of the members, both on the bench and the bar, were then totally ignorant as to these basic outlines of the chronology and development of Hindu Legal literature. They took the assistance of the Hindu Pandits and sometimes cited their opinions in deciding cases. It was only in 1868 that a statutory prohibition was imposed upon Judges from accepting and quoting the opinions of the Pandits. For a Judge not knowing Sanskrit language, it was natural and sometimes even inevitable to misinterpret and misunderstand the Dharmashastras, when they depended only on translations and especially when they did not know the customs and traditions of the Hindu Society. And therefore howsoever strenuously they have tried to apply ancient Hindu Law to the modern society without any consideration about their unsuitability or without introducing an element of equity, justice and good conscience as understood at the time of deciding cases, still Hindu Law has been altered in several respects in the opinions of those who are adepts and well-versed in Hindu Law. If this process of misconstruction continues there is no knowing where we shall be drifted, and as Dr. Ganganath Jha, Vice Chancellor of the Allahabad University, rightly observed, the time does not

seem to be off when Hindu Law as administered in our Courts will cease to be recognized as distinctly Hindu.

This is not at all a satisfactory state of affairs and hence it is urgently necessary to know the importance and meaning of the original Hindu texts in accordance with the recognized canons of interpretations enunciated by ancient Hindu Jurists. It is not to be supposed that ancient law-givers desired to lay down eternal verities applicable for all times and for all climes and having regard to the time and spirit of ancient jurisprudence, certain changes may not be in direct conflict, but in unison, with the principles underlying Hindu Law. The study of Purva Mimamsa may help us in understanding and applying that law and hence the Central Hindu Law Research and Reform Association has been established at Poona, with Sir M. B. Chowbal, ex-Justice of the High Court of Bombay as its President. The draft constitution of the Association is being circulated for favour of opinion to various bodies and Provincial and District Societies will have to be founded to further the cause which the Association has at heart. Members of the legal profession, judges and jurists, shastris and pandits are therefore requested to co-operate with the Association in its aim and activities and any suggestions regarding draft constitution and method of working addressed to the Secretary Hindu Law Research and Reform Association, Mimamsa Vidyalaya, Poona, will receive the most careful consideration of the body.

N. V. Bhonde B. A., LL. B., Poona.

Provisional Constitution of the All-India Hindu Law Research and Reform Association, Mimamsa Vidyalaya, Poona.

1. *Name* :—The name of the Association shall be the All India Hindu Law Research and Reform Association.

2. *Head quarters* :—The Association shall have its Head Office at Poona.

3. *Aims and objects* :—The aims and objects of the Association shall be (a) to promote the study of original works on Hindu Law; (b) to examine judicial decisions and statutes affecting Hindus in

the light of principles underlying the system of Hindu Law, which are to be determined by interpretation of texts and customs, according to the recognized canons of interpretation enunciated by the ancient Hindu Jurists; (c) to propose legislation with a view to rectify errors in the administration of Hindu Law, arising from departures from the true spirit of Hindu Code; (d) to propose in-

introduction of changes not in direct conflict with the spirit of Hindu Law ; (e) to take all steps conducive to the attainment of the aforesaid purposes, and (f) to co-ordinate the working of different provincial bodies.

4. *Constitution* : — (a) Constituent units :—The All India Hindu Law Reform and Research Association shall be constituted of provincial bodies which are in existence or which may come into existence hereafter. Further, Vakils, Advocates, Solicitors, Barristers, members of the Judiciary (including the retired members), Shastris and Pandits and persons approving the aims and objects as mentioned in Article 3 above and paying a quarterly subscription of rupees two can individually become members of the Association.

(b) The Council of the Association shall consist of 1. President, 2. two vice-Presidents, 3. two Secretaries, 4. Four members elected by each of the Provincial Bodies and 5. two members well-versed in Nyaya and Mimamsa to be co-opted.

(c) The President, one Vice-President and one Secretary shall ordinarily be elected from members residing at the head quarters.

(d) Office-bearers of the Council shall be the respective office-bearers of the Association.

5. *Provincial Bodies* :—For the purposes of the Association the following shall be the Provinces :—

(1) Bombay, (2) Madras, (3) Bengal, (4) United Provinces, (5) the Punjab and N. W. Provinces, (6) Oudh, (7) Burma, (8) C. P. and Berar.

6. *Jurisdiction* :—Head quarters of each of the Provincial Bodies shall generally be places of the High Courts or Chief Courts of the respective Provinces and they shall have a territorial jurisdiction equal in extent to that of the respective High Courts or Chief Courts.

7. *Subscription* :—Each Provincial Association shall pay a minimum annual subscription of Rs. 60 payable in two six-monthly instalments each due on 1st August and 1st February.

8. *Official Year* :—The official year of the Association shall be from 1st April to 31st March of the next year.

9. The Member of the Council and the Office-bearers shall be elected every

third year. The first triennium shall commence from 1st April 1927.

10. *General meetings* :—The Association shall ordinarily meet once in a year, usually in the month of May. If necessary the Association may convene general meetings of members to discuss questions of urgency or importance.

11. *Quorum* :—(a) One-fourth of the number of the members of the Council shall form the quorum in all meetings. 15 Members constitute quorum for Meetings of the Association.

(b) No quorum is necessary for adjourned meetings.

(c) Members, unable to be present at the time of meetings can attend the meeting through proxy.

12. *Notice of meetings* :—At least 15 days' notice shall be given for the meeting of the Association.

13. *Vacancies* :—Vacancies occurring among Office-bearers through leave, resignation or otherwise in the course of the triennium shall be filled up by the remaining members of the Council.

(b) If any Provincial Association fail to elect its representatives to the Council of the All India Association within the time fixed for the purpose, the other elected members including the Office-bearers shall nominate such members from among the members of the Province which fails to return the members.

14. *Secretaries* :—(a) The Secretaries shall keep records, carry on correspondence of the ordinary nature, convene meetings, publish accounts thereof and do other incidental work.

(b) They shall have the power of carrying into effect all decisions arrived at by the Association.

(c) On their own initiative they may take all action consistent with the principles and objects of the Association.

(d) All expenses of recurring nature shall be incurred by the Secretaries and any item of expenditure beyond Rs. 30 shall require the sanction of the President.

15. *The Provincial Bodies*.—The Provincial Bodies may frame rules and constitution not inconsistent with the aims and objects of the All India Hindu Law Reform and Research Association as laid down in R. 3 above.

16. *Change in Rules* :—The rules and constitution of the Association can be

changed only by three-fourths of the majority of votes of members present at the meeting convened specially for the purpose.

17. *By-laws* :—The Association can make Bye-laws and Bye-rules not inconsistent with the objects and spirit of the Association for its detailed working.

Reviews

The Indian Law of Hearsay Evidence by *Mr. Syed Anees Yusoof, Bar. at-Law*, and published by the UNION PRESS, MEERUT: 1927 Edition—Over pp. 400. Price Rs. 6.

This book which is printed and published by the Union Press, Meerut, deals with a branch of the law of evidence that is not dealt with separately so far. Ordinarily such piecemeal treatment is defective in that a sound general view of the whole subject is naturally lost sight of. However, this subject perhaps deserves a separate treatment in view of the fact that it is not generally well understood. The law on this subject is scattered over two chapters of the Evidence Act, viz. Chaps. II and IV, and the author must have had a lot of trouble in gathering the cases on the subject. The English writers start by laying down a general rule that hearsay is no evidence and then proceed to state the exceptions to this rule, amidst the number and intricacy of which the rule itself is too often lost sight of. The Indian Code, on the other hand, while laying down as a general rule that oral evidence must be direct, embodies what might appear to be the exceptions to this rule as separate and distinct rules, regarding the subject-matter of these supplementary rules from an independent standpoint of view afforded by the idea of relevancy. In this state therefore such a book is sure to be welcome.

The Subject-Noted Index of Cases, by *Mr. R. Narayanaswamy Aiyar, B. A. B. L., Vakil, High Court, Madras*, in two volumes and published by The Madras Law Journal office, Mylapore, Madras. Vol. I, over 1,500 pp., 1927 Edition. Price of the full set Rs. 20. from September 1927.

This work, in two volumes, the first of which exceeds 1,500 pages, is a monument of extraordinary industry and unusual application. The first volume

under review only covers three Courts, the Privy Council, Calcutta and Bombay and yet it extends over 1,500 pages of double crown size. In point of material this work, therefore, surpasses all other works so far in the field. In fact, it is not a mere index, but stands midway between the ordinary indexes and the well-known Lawyer's Reference of the Law Printing House.

When a lawyer is aware of a case, whether leading or not, in order to be sure that the law laid down in the case is sound even at present he would necessarily desire to know whether it has been judicially noticed and in what way. Exhaustiveness therefore in such cases is the greatest merit. Another merit of the work is that in every case, even where a Judgment deals with only one point, the point or the several points which are judicially dealt with in later cases, have been invariably given in apt catchwords.

A still more useful feature of this book is the indication of the exact page of the report wherein the case is judicially noticed in subsequent cases. The utility of this feature will be highly appreciated especially in cases which extend over one or two hundred pages. For example: 45 *Cal.* 169 at page 254, is indicated in page 106, col. 1, line 8, of the volume under review; so also 48 *Mad.* 1, at page 220, is indicated in page 1395, col. 2, line 14.

In a book dealing mostly with figures accuracy is perhaps the very first thing that one would look for and we hope this book can claim this merit.

For the convenience of the readers of the ALL INDIA REPORTER a separate and independent table is to be annexed at the end of the book giving equivalent reference of the All India Reporter to other journals and vice versa from the year 1914.

The printing and the get up is ex-

cellent, and notwithstanding the above merits, the price is surely moderate.

The Principles and Precedents of the Art of Cross-Examination, Vol. I by *Mr. P. Ramanatha Aiyar, B.A., B.L.*. VAKIL, TRICHINOPOLY and published by The Globe Publishing Co., G. T., Madras to be published in three volumes Vol. I—Over 450 pp.—1927 Edition—Price Rs. 3-8-0.

This second edition of the well-known work on the Art of Cross-Examination by Messrs. P. Ramanatha Aiyar, P. Raghava Aiyar and K. S. Venkatrama Aiyar is an improvement over the first edition which was published in 1920 and has already been found to be very useful to beginners at the Bar. Indeed, no pains have been spared in including whatever is useful in the works that have been written on the subject. It is in fact, as the publishers say, a mine of most useful information. The printing and get-up are excellent.

Trial of H.R. Armstrong in the Notable British Trials Series published by *Messrs. Butterworth & Co. Ltd.*, 6 HASTINGS STREET, CALCUTTA—1927 Edition—Price Rs. 6-8-0.

Truth is said to be stranger than fiction. The book under review indeed proves the proposition. The culprit who was charged with poisoning his wife happened by a strange coincidence to be suspected of committing the heinous crime through tea by a Doctor who had treated the culprit's wife and also the rival of the culprit who was called by the culprit to take tea with him. The

body of Mrs. Armstrong was examined and some arsenic was found there. A sudden and unexpected search led to the discovery of a packet of arsenic in the pocket of the culprit. But the piercing questions by Mr. Justice Darling could alone break through the calm and confident attitude of the prisoner which was strengthened, not a little, by the able advocacy of Mr. Henry Curtis Bennett.

Though from a legal point of view there were not many questions involved in the case, the fascinating interest of the case is rarely surpassable and this notwithstanding the fact that there is no halo of age about the trial which took place only in 1922.

Trial of Madeline Smith in the Notable British Trial Series published by *Messrs. Butterworth & Co. Ltd.*, CALCUTTA—1927 Second Edition—Over 400 pp.—Price Rs. 6-8-0.

This second edition of the Trial of Madeline Smith maintains the standard of the Notable British Trials Series. Madeline Smith was charged for the murder of her lover L'angelier by the administration of arsenic poison. But she was acquitted as the charge was not proved in the Scottish Court. Her memorable trial occurred in 1857 when she was 21. The special feature of this second edition is the inclusion of the unexpurgated letters of Madeline Smith and the beautiful introduction by one of her own sex. This unhappy woman at the age of 90 has now been served with a notice to leave the United States within one month on the plea that there is a danger of her becoming a charge on the public funds.

Jotting

A Note on the Early Law Reports in England and Scotland.—"Dr. Johnson not only discussed with his biographer the merits of the cases in which the latter happened to be engaged and, as we have seen, assisted him in the preparation of his arguments, he frequently also discussed the ethics of advocacy and the philosophy of law. In 1773 the subject of law reports appear to have engaged their attention when Johnson laid it down that "the English reports, in general, are very poor; only the half of what has been said is taken down; and of that half, much is mistaken. Whereas in Scotland, the arguments on each side are deliberately put in writing, to be considered by the Court. I think a collection of your cases upon the subjects of importance, with the opinions of the Judges upon them, would be valuable." Without pausing to consider the relative merits of the then contemporary English and Scots law reports, it is interesting to note how, in the latter, the statement of the arguments almost completely overshadowed the decision, a circumstance explicable, as Johnson indicated, by the fact that in the preparation of their reports the reporters had before them to work upon the written arguments of counsel which, being plentifully interlarded with citations from the civilians and continental jurists like Pothier have an extremely learned look, whereas the decision is dismissed in a few lines, a partial explanation of this being found in the following instructive passage in Lord Cockburn's *Memorials of His Time*: "There were no judicial reporters or 'collectors of decisions' formerly, except two advocates, who were appointed and paid by the Faculty for doing this work. Right reporting was attended then with some risk. It had never been the practice to give any full and exact account of what passed on the Bench, but only results. The public, or at least the independent portion of the legal Profession had begun to require something more, and their Lordships were very jealous of this pretension. They considered it as a contempt; and the contempt was held to be aggravated by the ac-

curacy of the report. Mr. Robert Bell, afterwards Lecturer on Conveyancing to the Society of Writers to the Signet, was the first who adventured on independence in this matter; and he announced that he meant to report without any official appointment, and to give the opinions of the Judges. This design was no sooner disclosed than he met with many threatening hints, and as much obstruction as could be given in an open Court. The hated but excellent volume at last appeared, and though the Judges were only denoted by letters he was actually called into the robing room and admonished to beware. Eskgrove's objection was 'The fellow taks doon ma' very words'—a great injury to his Lordship, certainly. More than ten years passed before it was acknowledged by rational Judges that the offensiveness of publishing each opinion was no inconsiderable proof of its utility."

Since those days many changes have been effected both in the English and Scots reports. The tradition of lengthy arguments was long maintained in the North, and during the first half of the nineteenth century the English reporters also devoted what we now think an undue amount of space to recording the contentions of counsel. All this was very learned and occasionally of great use in the preparation of arguments in subsequent cases, but it appears to have been overdone, and the tendency now is, when the arguments are given at all, to indicate them as briefly as possible; but as arguments have been abbreviated the judgments have been expanded owing to the increased use of shorthand and the general desire of the Profession to be supplied with as close an approximation to what the Judges have actually said as a due regard to grammatical considerations will permit, for just as Luther complained to his friend Melancthon, when they were engaged in translating the New Testament, that it was "desperately hard to make the Apostles talk German;" so many a reporter has had to confess to the difficulty of making certain Judges talk grammatically—*The Law Times*, Volume 162, page 193.

THE
ALL INDIA REPORTER

JOURNAL SECTION

1927]

[SEPTEMBER

NOTES & COMMENTS

Husainbhai v. Bhansilal : A. I. R. 1924 Nagpur 338

By M. G. SHIRSALKER, Pleader, AKOLA

1. The facts of the case are quite simple. During the pendency of the suit, on the application of the plaintiff's pleader and the defendant, the Court made an order of reference to arbitration. In due course the arbitrators filed their award which, it appears, went against the plaintiff, who thereupon applied for setting aside the award on the ground that he had not agreed to the reference, his pleader, who so agreed for him, having no such authority. Both the trial and the first appeal Courts found that his pleader had such authority, and, consequently, refusing to set aside the award respectively, passed and confirmed the decree in terms of the award. Plaintiff then went in second appeal to the High Court, where, for the first time, the defendant-respondent's counsel raised a preliminary objection that no appeal lay from the decree of the trial Court under para. 16 (2). The High Court presided over by Kinkhede, A. J. C., overruled the objection and held as follows :

"In these appeals (appeals between the same parties involving the same question) Kotwal, A. J. C., held that a restrictive provision like that of para. 16 (2) must be construed strictly, and so the legislature must be taken to have contemplated that the decree, in respect of which para. 16 (2) provided that there should be no appeal, must be one which has been passed after substantial compliance with the preceding provisions of the schedule. He also held that, where the validity of the reference is attacked, the Court, in order to deter-

mine whether an appeal lay from the decree in such a case, must decide whether the reference was valid or invalid, and, if it were valid, the decree will be a decree under the second schedule and no appeal will lie therefrom if it is passed in terms of the award. If the reference is not valid, the decree will not be a decree under the second schedule and will be open to appeal like any other decree not coming under the schedule *

* * * *. In the present case I therefore hold that if the reference could not be validly made by Mr. Pangarker (plaintiff's pleader), the arbitrators would have no jurisdiction to take cognizance of the matters in dispute between the parties and their award, though made upon a reference through the intervention of the Court, would be null and void on the ground that it was made on a reference to which all parties interested did not agree as required by para. 1, Sch. 2. "

The learned Judge then, after first holding that the plaintiff's pleader had no authority to refer the suit-matter to arbitration, set aside the decrees of the first two Courts and remanded the case for trial on merits.

THE CRUX OF THE REASONING

2. The most important question in the case was whether the appeal lay from the decree passed in terms of the award when the reference was invalid. The respondent's counsel contended that no appeal lay from the decree so as to enable the plaintiff to assail the decision of the trial Court about the validity of

the reference, in view of the plain words of para. 16 (2). The Court overruled this. The decision may be summed up as follows:

(i) A restrictive provision like that of para. 16 (2) must be strictly construed, and so the Legislature must be taken to have contemplated that the decree in respect of which para. 16 (2) provides that there should be no appeal, must be one which has been passed after substantial compliance with the preceding provisions of the schedule.

(ii) If the reference is not valid, the decree will not be a decree under Sch. 2 and will be open to appeal like any other decree not coming under the schedule.

Kinkhede, A. J. C., has extracted these dicta from a previous judgment of Kotwal, A. J. C., in a previous and similar case, and adopted the same as sound law. The rest of his observations, beginning from: "I therefore hold, &c.," till the end are more intended to show how the said law applies to the facts of the case than to add anything further to the reasoning adopted by Kotwal, A. J. C. His specific reference to the null and void nature of the award, because the reference is invalid, would thus not call for any special notice. If, however, by the emphasis, it is meant that para. 15 refers only to voidable awards, as opposed to awards void ab initio, that is, *ultra vires*, it is against the plain and ordinary meaning of the word "invalid" in the newly added words, "or being otherwise invalid" in para. 15 (c), and would be attributing partiality to the legislature for having made exception in respect of the two kinds of ab initio invalid awards coming under the first two clauses of para. 15 (c). On the other hand, if the emphasis is only meant to cover the particular class of awards which are based on invalid reference, then, that is already implied in the two dicta of Kotwal, A. J. C.

3. This Nagpur reasoning has first to be understood and its essential part separated from the non-essential. In this view, (i) the expression "the legislature must be taken to have contemplated;" (ii) the relationship of cause and effect between the two propositions, viz., (a) para. 16 (2) must be strictly construed, and (b) the legislature must be taken to have contemplated, which is sought to be established by the use of

the word "so;" and (iii) the general term "the preceding provisions of the schedule," may well be considered first.

As regards (i): the expression means prying into the intention of the legislature, which is quite unjustifiable when the words of the statute are clear: *Narendra v. Kambalbasini* (1), *Nilmani v. Raja Sati Prasad* (2). There is not a word in the whole of the judgment throwing any doubt on any expression in either para. 15 or para. 16. Besides the reasoning itself does not lose any of its force if this expression is dropped. As regards (ii): there can be no dispute with the proposition that para. 16 (2) must be strictly construed. But it is difficult to understand how that brings down the control of para. 1 on para. 16, or in other words, how it follows that a decree under para. 16 must be one which has been passed after substantial compliance with the preceding provisions of the schedule. However strictly the words of para. 16 (2) be construed, there is no escape from the clear words of the whole paragraph. A strict construction does not mean the overlooking of this clarity and cannot even cover the case of absurdity which sometimes arises if the plain meaning is adhered to. Besides no such absurdity is even hinted at in the judgment. So this piece of argument also may very well be omitted. As regards (iii): the expression "the preceding provisions" without any qualification makes one think that a compliance with all the preceding provisions from paras. 1 to 15 is meant. No doubt para. 16 does refer to para. 14, expressly and impliedly perhaps to para. 15, but beyond that there is absolutely no reference to any other paragraph. In the case under notice, a consideration of paras. 1, 15 and 16 alone is involved, and so there was evidently no need for such a broad dictum. It is clearly obiter, at least so far as paras. 2 to 13 are concerned. However, if the series of exceptions to the general rule of finality embodied in para. 16 (2), arising under these paragraphs, are to be supported on the general principle that the rule of finality cannot apply to *ultra vires* actions of the Court under these paragraphs, even though they have led to awards and

(1) [1896] 23 Cal. 563=23 I. A. 18=6 Sar. 663 (P. C.).

(2) A. I. R. 1921 Cal. 397=13 Cal. 556 (F. B.).

decrees after the determination of the objections raised on the very ground against the objector, then, that is a ground common to para. 1 and need not be separately considered here. Thus it is clear that all the above three items in the Nagpur reasoning are either surplusage and obiter or unsound, and so can very well be omitted in our study of the Nagpur view. This view, then, devoid of the above three items, comes to mean and lays down that a decree in order to be one under para. 16 (2) must be one which has been passed after substantial compliance with para. 1, or to say the same in a negative form, where the reference is invalid, the decree cannot be said to be one under para. 16 (2), or in short, para. 16 depends for its operation on compliance with para. 1.

NO SCOPE FOR INTERPRETATION

4. The appeal in the case in question was contended not to lie under para. 16 (2) and the question involved, thus being solely concerned with the interpretation of para. 16, has to be considered with reference to the wording of the said paragraph. This paragraph runs thus:

16 (i) Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in manner aforesaid, and no application has been made to set aside the award or the Court refused such application, the Court shall, after the time for making such application has expired, proceed to pronounce judgment according to the award. (ii) Upon the judgment so pronounced, a decree shall follow and no appeal from such decree shall lie except in so far as such decree is in excess of or not in accordance with the award.

Evidently, had there been any ambiguity in the whole or any part of this para, either in the expression or in the meaning, that would not have escaped the notice of the learned Judge who decided the case. The absence of any reference to the wording of the paragraph shows that he did not want to dispute the clearness of the language. In fact, also, both the procedure and the meaning of the para are quite clear. After the award is filed in the Court, unless the Court sees cause to remit the award for reconsideration, the Court, when either there is no application to set aside the award or if there is any it is rejected, has not only simple jurisdiction, but is

bound to give judgment and decree in terms of the award, of course, after the time fixed for making such application has expired, and it is only when such decree is in excess of or not in accordance with the award that an appeal lies therefrom. So the jurisdiction or rather the compulsory duty of the Court to pass an unappealable decree in terms of the award is dependent on three conditions, viz., (1) the Court should not see reason to remit the award for reconsideration; (2) there should be no application to set aside the award, or if there is any, it should have been refused by the Court, of course judicially; and (3) the judgment should be given after the time fixed for making application to set aside the award has expired. The last condition or the words "after the time for making such application has expired" in para 16 apply only when there had been no application made to set aside the award: (see the remarks of White, C. J., in *Bacha Saheb v. Abdul* (3). All the three conditions must be satisfied before the Court gets a jurisdiction. A non-fulfilment of any one of these makes the judgment or decree in terms of the award ultra vires of the Court under para 16 and an appeal would lie therefrom; *Tursi v. Basdeo* (4); *Sahadeo v. Melhusing* (5). "It appears to be their Lordships' conclusion that if the first two clauses of S. 522 are complied with, the decree passed in accordance with the award is final except as provided in the last clause" is the observation of Krishnaswamy Aiyar, J., in *Surya Narayana v. Sarabhah* (6) with reference to *Ghulam v. Muhamad* (7), where the Judicial Committee had interpreted S. 522 of the Code of 1882 corresponding to the present para. 16, the first two clauses of S. 522 being the first two clauses of para. 16 (2) or the two conditions mentioned above. Thus the words of the paragraph are clear in laying down that it is only when any one of the above three conditions is not satisfied that the decree could be said to be ultra vires of the Court, that is, not one under para 16. The paragraph does not

(3) [1914] 38 Mad. 256=25 M. L. J. 507=21 I. C. 308=(1914) M. W. N. 142.

(4) A. I. R. 1926 All. 567.

(5) A. I. R. 1927 All. 120=49 All. 178.

(6) [1911] 21 M. L. J. 263=9 I. C. 173=(1911) 1 M. W. N. 151 (F.B.).

(7) [1902] 29 Cal. 167=29 I. A. 51=6 C.W.N. 226=8 Sar. 154 (P.C.).

mention the non-compliance of para. 1 as one of these conditions. This omission means the exclusion of the same when other conditions are specifically mentioned: vide the decision of Addison, J., in *Ishar v. Municipal Committee, A. I. R. 1927 Lah. 140* where he holds that when the local Government, under its power of extending as many sections of the Punjab Municipal Act as it likes, applies or extends certain sections, that means that others were not intended to be extended. Thus all the considerations advanced on the basis of any inferences about jurisdiction of the Court arising from the interpretation of para. 1 are

foreign to the interpretation of para. 16 which, being clear, leaves no scope for interpretation. When the words of a statute are clear, it is the bounden duty of the Court to give effect to their ordinary and plain meaning: *Narendra v. Kambal Basini* (1). *Nilmani v. Raja Sati Prasad* (2). The policy of finality that is to be found in para. 16 (2) cannot be evaded on any ground of *argumentum ad inconvenienti* and if there is any objection to the policy itself the remedy lies in the hands of the legislature and not in the hands of the Law Courts which are compelled to administer the law as it stands.

(To be continued)

Articles

A CRITICISM ON 'LAW Versus JUDICIAL DISCRETION.'

(vide A. I. R. 1927 Journal 29.)

BY S. N. NARAHARAYYA, B. A. LL. M., Advocate, Bangalore City.

Mr. Harish Chandra Mital, writing on "Law versus Judicial Discretion" makes certain observations, which, with due respect to his learning, require an examination at the hands of students of law. Had he examined severally or analyzed abstractly and determined the merits and demerits of each, instancing his results, of course, with facts from history, and endeavoured to show which has a preponderating virtue over the other and has to be preferred, it would have been a service to the cause of jurisprudence. But he adopts a different course and begins by saying that "before the advent of British rule the law that prevailed in this country for thousands of years did not consist of a Code or even of any definitely laid down principles." Evidently his is less a juridical interest, but more to expose the supposed defects that prevailed or yet prevail in India. He does not restrict the truth of that statement to the days of "kazi" (of which we propose to make no observation) but by the express words "for thousands of years" extends it even to the days of "Pradvivaka." Reading it with his other remarks: "Before the advent of the British rule there was neither law nor legislature the king and kazi being everything," "though the circumstances

have changed in our coming in contact with the West," and so on, one cannot suppress his dismay that such a sorry picture of Hindu society and its administration of justice should have been attempted. There might not have been "law" and "legislature" in the Western sense, but were there not other things and institutions equally good, if not better, that effectively answered the purpose? Because the Western system has its own merits, should it necessarily follow that no other system, ancient or modern, could at least be equal to it and has to be condemned and shoved to the background? Writing as a jurist the purpose of one is rather academic, and if he speaks in eulogy of a bygone system it is no inference that he advocates the present should be forsaken and the past alone adopted. There may be difficulties of all sorts, even if one would wish it, but the knowledge of a system that was well conceived and has stood the test and onslaught of time has its own good. The present purpose therefore is twofold—to give even, at some length, a true picture of the Hindu system of administration as could be gathered from the standard Sanskrit works recognized on all hands as authority and to examine some of his

other statements that also require an examination.

In matters like this it is well to start with clear data. After an elaborate examination of the subject Professor Clarke arrives at the conclusion that law is and has ever been a declaration of people's will. That is our notion too, and it may be express as in legislation, and tacit as in customs, etc. The "law" of India (popularly known as *nyaya*) was of the latter sort, and though there were *smritis* they promulgated no new laws, but only adjusted the old eternal (*Sanatana*) *dharma* to cover the new field of changes wrought by time. The eternal *dharma* could be compared to Euclid's *Elements* and *smritis* (including *Puranas* to the extent they are *smritis*) to works of deductions, mainly problems, whose constructions only are given but proofs left to ourselves. "Law" was but a species of *dharma*, and while *dharma* was the ideal, "law" was only a real or practical phase of it. *Dharma* contemplated both tangible and transcendental effects, while "law" could stop at the first. *Dharma* appealed to transcendental reasoning while "law", not opposed to *dharma*, to the human. The principles of *dharma* (for there could either be *dharma* or "law" not opposed to it—and both from the practical point of view called *nyaya*, in which sense "law" is used here) are neither hidden nor vague, but have been examined at length though with particular reference by *Jaimini* and other sages and are formulated in the most pithy forms ever known. *Colebrooke* may complain that they cannot be understood without commentary, but that is no conclusion that they are not "definite." "Definiteness" in such matters depends upon the class of readers for whom a work is meant, the training they have received, and the amount of knowledge they bring into its study, and one should not be disappointed if the "definiteness" of a work is not of the standard he expects. It is true that reasoning is not developed there independently or in an abstract manner but those were the days of (to borrow words from *Aristotle*) "master sciences" and "subordinate sciences", and the latter were always, at least in India studied for, and in the midst of, as occasion arises, the former and not independently for their own sake e. g. *Trigonometry* was

studied in the midst of *Astronomy*, *Logie* in the midst of a system of philosophy, and so on, and things past have to be taken and understood as they stood. Two words "*dharma*" and "*arya*", the latter the highest form of appeal and the former of conjuration, have played an important part in our history and there was hardly a relentless man who would not bend when the words *dharma* *arya* (heed) *dharma* noble sire, were addressed to him. *Dharma* was all "written" with its own rules, based on eternal principles too, as to its adaptability to particular places, times, and circumstances in the sense of promulgated, though not taught to the willing and the unwilling, the earnest and the curious alike, or perhaps not so widely committed to paper, parchment, or the like, and preserved, published, or circulated as at the present day. Each man carried in his head the necessary elements and the main principles at least of it (and the fact that they were thrown into verses or aphorisms helped him to easily learn and remember them) and knew what to do with advantage to himself and what to omit for fear of punishment now or in the near or distant future. *Dharma* being known it was easy to know what is not opposed to it. *Dharma* was taught keeping in view *Brahman* as a type and in going down to the classes and castes its rigidity was relaxed, e. g. all intoxicants were prohibited to a *Brahman*, but with respect to the other castes some were tolerated though discouraged or allowed to the extent they served any useful purpose (for example *virapana*, invigorating drink to a *Kshatriya* about to fight). This and the like things of adjusting *dharma* to the various phases of society gave rise to a body of rules, formulated or formulatable the whole collection of which could go by the name of "law" (*nyaya*), the absence, partial or total, of the transcendental element being the differential. As regards "judicial discretion" our learned writer makes no secret that what the Judge would say was law and he could give awards and punishments at pleasure, arbitrarily unchecked, and without fear of consequences, and so the measure of his justice was long or short according as his "foot." By "Code" he apparently means a collection of law which the rulers apply in governing the subjects, as, for example, the Code

Napolean or the German Civil Code. It could be confessed that of such "codes" there were none in India, and the "codes" we had were books embodying the rules of conduct, private and public, subjective and objective, of both king and people.

The remark of Mr. Justice Holmes that "because an idea seems familiar and natural to us (there is the danger of our supposing) that it has always been so" could be recalled to mind here with appropriateness. Living in the days of British Indian "Codes" and "Acts" one might think that the conditions that brought or bring them to existence did always prevail, and want or absence of "legislature," "law," "code" etc., marks either no or imperfect advance in the civilization of, or the height reached and kept by a people. But that neither such conditions nor such "codes" could be absolute or permanent is illustrated from the history of the Roman Law from the drawing of the Twelve Tables down to the code of Justinian. It was how the spirit of the "code" (Twelve Tables) went on changing in the name of interpretation (as was known to the Roman Law), how the huge mass of legal literature had accumulated, and and how Justinian after his code was drawn up, had to prevent its further multiplication by actual legislation, the scope moreover of a "code" may be different at different times and what would be included under it at one time might be detached from it at another (even as "Rules" from our Civil P. C.) and given a new place and name. The codes of Manu and others might for a like reason contain more things that could be called strict "Law" but yet in the opinion of its redactor, equally learned and honest, they were obviously deemed necessary. The glory of a code is not in its being "clear cut" and "well-defined" but in its spreading accurate knowledge of law and being read and understood by the people. In Western countries law originates in legislatures composed of people's representatives in all democratic and constitutional countries, and even in aristocracies where they emerge from a single despot or a few autocrats, they have nevertheless an indigenous element in them and may at worst look harsh or tyrannical. But the case of the Indian "Codes" and "Acts" is

different. First, the popular element in the Indian legislature (a subordinate legislature) there was hardly any in the days when the penal and the most important other codes were framed and passed. The framers of them took their own view of things probably actuated by their experience, information or, impression, as for example, "in Macaulay's draft of the Indian Penal Code breaches of 'contract for the carriage of passengers (by palanquin-bearers) were made criminal" and the horror which people had for *kala pani* was taken advantage of to prescribe punishments of transportation (—is there such a thing in England?). Secondly, the alien legislators modelled the law on the institutions prevailing in the West e. g. the Indian Evidence Act is based on the English law of evidence modified to suit India — to suit India according to whom? — and "it is in the main in accordance with the English law though it does not in several respects materially diverge from that law" and familiar to a nation with a different civilization and different traditions, and thrust it willy nilly on a choiceless people. Even now it is a familiar matter that on a point of necessity of a measure the question is not whether the Indian conditions and requirements demand it, but the state of things in England is cited in justification of it. Thirdly, they are in English and how few of the literate few (10 per cent. of men and 1 per cent. of women were literate in any language in 1916, when also only 23 per cent of boys and 5 per cent. of girls were at school) that India has, can understand them all is a moot point. They form the Austinian "command" enforced by the "political superiors" with the rigid notions of "sanction" and with hardly any regard to the conscience and sentiments of the latter. Their advantage of being written is all lost they being at best knowable and not known. They are but guides to judges and magistrates and also to lawyers who help them in administering law. They are not an unmixed blessing and either because of any defective expression (e. g. Sir James Stephen who drafted "that master piece of legislation, the Indian Evidence Act"—though Amir Ali and Woodroffe would say "it is to be re-

gretted that the Act was not so framed as to admit other rules of evidence on points not specifically dealt with by it"—was admittedly very poor at drafting) or because of any lacunae, the correct law on a point may be understood to be one by the people and another by the administration with a result deplorable. Regarding certainty it was once rightly remarked by a first-rate lawyer and jurist that nobody can be sure of a point of law except a young student for his Degree Examination or a civilian judge who just begins to administer law. "Written" law the "codes" are and so the precedents too, and between the brevity of the one and the prolixity of the other one often falls to the ground. The law can only become familiar to the people either by universal study or with the lapse of time till the precedents have sunk deep down to the lowest strata of society. As it is no one studies even the elements of law at an early age and it is reserved to be studied as a special faculty with a professional or the like object by a few after graduating in a university, and the majority of the people, otherwise educated, can go to the end of their lives without knowing what "consideration" or "satisfaction" means as applied to contracts. This is true both of substantive and adjective laws and granting that the old "law" of India was the monopoly of a few one fails to see the advantage of a "code" over it.

But the Indian conditions of old days were different. The first portion of man's life, which psychologists call the period of observation, was marked as a period of innocence, and one could then "move at pleasure talk (or dispute) at pleasure, and eat at pleasure" in so far as it did not affect his caste. Then at an age of eight, eleven or twelve according as his caste, for caste had an important bearing on the heritable capacity and precociousness, he was required to observe purity and righteousness. Purity was of three kinds, of mind, talk and act, and righteousness both subjective and objective. These two formed the theme of dharmasastra which was his first study and being able to conduct himself properly pure and righteous he had to study other things. (1) In practice there was an elaborate system of disciplinary everyday routine

which lasted for life, some of which may look meaningless, tedious, and even hopelessly fettering, and it was imposed on him in order to produce and continuously foster an invisible force in him which could resist temptations, brave difficulties, defy fears, and keep him in the path of virtue. This was Achara and then came (2) vyavahara or the rules of dealing with the world. (3) And lastly, came prayaschitta which is wrongly pooh-poohed by the moderners. It was self-punishment for any deviation from the path of virtue or duty or any omission of acts compulsory and leading thereto. The punishment was combined with taking a determination never to commit or repeat such again. It was mainly reformation though the other elements, abhorrent, preventive and retributive were not altogether absent. Legal standards in India were internal first and external next. One could be his own successful accuser, true witness, and impartial judge, and however impossible or worse that might sound in these days of individualism there was a time of self-negation when nothing was truer or more truly followed. The bulk of the populace did not require the State (i. e. the king) to govern them, and the State there was only to keep off the enemies external and internal and be the insurer of life and property. There was no notion of offended majesty of the state and it launched no prosecution on that score. One could commit even the worst crime, and yet so long as he undertook to punish himself by prayaschitta the State never interfered. It was meant for body and mind both, and his abject appearance in the prescribed mode during its term proclaiming his guilt over and over again within every hearing, often exposed to the contempt and rebuke of the public, had an abhorrent effect on the public and went a long way in preventing offences. Failing self-punishment came punishment by the king which, of course, had a deterrent effect. The notion of retribution was deeprooted and it was well believed that if you do him harm how he will do you like harm some time hence (even in one of your future lives). Even the meanest was allowed to live and even the most abominable a chance of making himself agreeable. The Dharmasastra that comprises the rules of all these

three (Achara, Vyavahara, and Prayas-chitta) was his first study at the very juncture of the periods of observation and character-formation, and the principle was that every one should be an all-round perfect member of society first and learned or anything else next. He was ever asked to curb himself internally and externally and could thus be expected to live a life far superior "to live honestly, to hurt no one, and to give every one his due" Such a person would not generally act "in any untoward manner," and cases, if any, of that sort were few and far between.

Such was the "law" the Hindus followed and not law declared by people with all their imperfections and their limited and ever-changing insight into morality and goodness. As regards justice our learned writer says "much depended upon who the victim of the act was, more upon who the aggressor was, and most upon who the Judge or Kazi was. "If this means a gradation of miscarriage of justice it could be averred that it was foreign to all the Hindu notions of "law" and justice. It could otherwise be true in a way, for, the more "favoured" a man was the more morality and susceptibility were expected of him. In point of period and rigour self-punishment was less and less in the descending order of castes and was full, three-fourths, half, and one-fourth respectively, and to modernize, if it was twelve years rigorous imprisonment to a Brahman it was three years simple imprisonment to a Sudra for the same offence. No *droha*, harm, was excused on the part of a Brahman at all though *alpadroha*, some little harm, was moderated to a greater and greater extent in the same order. Punishment had to meet the ends of justice, and either more or less was sin on the Judge's part. Only so much of it was meted out as was necessary to reform the offender and he was not made an unfortunate victim with a view to produce a direct deterrent effect upon society. Crime was effectively prevented in other ways of which watchful supervision was one, and in fact the king himself would move incognito among all sorts of people, so much so that even robbers could find it

hard to trust their "pal." There were detectives everywhere, and detectives of another sort to watch their doings, and in fact, when one believed that the king was sleeping in a camp a hundred miles off he would be moving with that very person. A Hindu king would have been shocked to be told of a costly police at the public expenditure, the more so of crime notwithstanding that, and the most so of the punishment of the offender himself to produce a deterrent effect upon society. He would take into account the susceptibility of the offender and where an admonition or rebuke would do he would not inflict corporeal punishment. Certainly justice between "any two and every two parties was not uniform" for the very reason that no precedent could be cited as on all fours with a case before the tribunal and no rule of stare decisis there was. Each case had to be decided as though no such had ever arisen before, and all depended upon the nature and gravity of the issues and the weight of the evidence produced. Just as "patting on the back" produces "the opposite results of jollity and anger", that is justice in one case might be otherwise in another though seemingly the same. Perfect and independent justice was insisted upon no matter what time and trouble it cost to the Court. Certainly too it was "a serious matter" should "an humble citizen assault a nobleman or a courtier" for much the same reason as treason is blacker than felony, incest than adultery, and patricide than murder. The external or the physiological act may be the same, but the magnitude of the offence has always differed according as the doer or the person affected or the circumstances under which it was committed. Even the English law holds the king's person sacred and historians are not wanting who characterize the beheading of Charles I as both "a political blunder and a crime." It is true that all souls are equal or the component parts of one whole, and if that argument be seriously advanced, then all socialist gradation should tumble down, and also it were a crime, nay a murder, to pull out a vegetable plant for food or fell a tree for fuel.

(To be continued)

THE ALL INDIA REPORTER

JOURNAL SECTION

1927]

[OCTOBER

NOTES & COMMENTS

Husainbhai v. Bhansilal : A. I. R. 1924 Nagpur 338

By M. G. SHIRSALKER, Pleader, AKOLA

Continued from A. I. R. 1927 Journal 56.

MERITS OF OUTSIDE CONSIDERATIONS ADVANCED IN THE NAGPUR CASE

5. The reasoning employed in the Nagpur case is that, when the reference is invalid, that is, when, owing to non-compliance with para 1, the Court has no jurisdiction to make the reference, but does so knowingly or otherwise, and when it refuses to set aside the award based on such reference and passes a decree in terms of the award, then such a decree cannot be said to be one under para. 16 (2), so as to come within the prohibition of appeal contained in the same. The underlying idea seems to be that, when the Court has no jurisdiction at the start it cannot have it at any latter stage. An additional idea or reason, along with this, for the conclusion that a decree based on an invalid reference is appealable, can be gathered from the dictum of the Calcutta High Court, which takes the same view as the Nagpur Court in this matter, in *T. Wang v. Sona* (8). The Court says: "S. 15 and S. 16 depend for their operation on a valid reference under para. 1." In this case, the matter of payment towards a decree was in dispute in execution. It was referred to arbitration through the Court and an award was made, and after the rejection of all the objections raised, a decree in terms of the award was passed. The first appeal Court held that no appeal lay on the ground that the subject-matter in dispute was not fit for reference, which was hence invalid. In second appeal to the High Court it was held that the objection was good and an appeal lay. Under these circumstances

it would appear that the interpretation of para. 15 was obiter. But, looking to the fact that, in that Court, a view that para. 15 is controlled by para. 1 prevails [see *Seth Doolychand v. Mamuji* (9)] it would be quite justifiable if it is supposed that one of the additional ideas under the above Calcutta dictum is that para. 16 is controlled by para. 15, meaning thereby that the refusal of an application to set aside the award, referred to in para. 16 must be one under para. 15 and when such refusal is the result of the rejection of any objection not coming under para 15, the Court does not get a jurisdiction to pass an unappealable decree. In short, the additional ideas are that para. 16 is controlled by para. 15, and that para 15 in its turn is controlled by para. 1. The reason for this control of para. 15 by para. 1 is to be found in the following observations of Mukerji, J., in *Seth v. Mamuji* (9). He observes: "If there is no valid agreement to form the basis of a reference under para. 1, Sch. 2 to the Code, there is no valid award, whereon a decree can be based in accordance with para 16. Reference has, however, been made to para. 15 to show that this is not expressly mentioned as one of the grounds on which the Court can be invited to set aside the award. This may be conceded; but, para. 15 obviously assumes a valid reference to arbitration, and only contemplates cases where the propriety of the award on the basis of such a reference is in question. Where, however, the jurisdiction of the

(8) A. I. R. 1925 Cal. 812=52 Cal. 559.

1927 J/8 b/4 & 9 a/4

(9) [1917] 25 C. L. J. 339=41 I. O. 295=21 O. W. N. 387.

Court is called in question, the Court has jurisdiction to decide that it had acted in contravention of the statute and consequently without jurisdiction: *Rashmoni v. Ganada* (10). This Calcutta view, about the control of para 15 by para. 1 is shared by Sulaiman, J. in *Gopal-das v. Baijnath* (11), where, in revision on facts on all fours with the Nagpur case, the question was whether there was material irregularity or illegality in the exercise of its jurisdiction by the Court when it decided that the reference under the circumstances was valid. He observes: "A preliminary objection is taken on behalf of the respondent that no matter if the decision of the Court below was right or wrong as to the objection raised before it, the order is not open to revision by this Court. Where objections are raised as to the proceedings before the arbitrator and they are the subject of a decision by the trial Court, it cannot be suggested that there has been any irregularity committed by the Court in exercise of its jurisdiction. Such objection, therefore, cannot properly be raised again in revision. But, when the appellant challenges the proceedings of the Court itself, and attacks a reference made by the Court to the arbitrator, it is not merely a question of a wrong decision by the Court, but may be one of irregularity or illegality committed by it in the exercise of its jurisdiction. The learned counsel has relied on the case of *Ajudhia v. Badarul* (12), where a learned Judge of this Court did observe that the objection to the validity of the reference ought to be raised under para. 15, Sch. 2, of the Code. But in the case of *Kanhayalal v. Jagannath* (13), decided by a Bench, of which the same learned Judge was a member, it was remarked that the objection to the validity of the reference was not an objection within the meaning of para. 15 and had no finality attached to it. With this last observation we agree. The objection is not as to the validity of the award only, but as to the illegality of the arbitration." What he holds in the above quotation is:

(i) All decisions on objections coming

(10) [1914] 20 O. L. J. 213=26 I. O. 275=19 C. W. N. 84.

(11) A. I. R. 1926 All. 238=48 All. 239.

(12) [1917] 39 All. 489=49 I. C. 857=15 A. L. J. 427.

(13) A. I. R. 1921 All. 16=43 All. 305.

under para. 15 are final and not open to revision on the ground of jurisdiction under para. 16.

(ii) An objection to the validity of the reference is not an objection within the meaning of para. 15.

(iii) Hence a decision on such objection is not final.

(iv) Objections to the proceedings before the arbitrator as distinct from and as opposed to the proceedings before the Court come under para. 15.

The additional idea contributed by Sulaiman, J., is that para. 15 covers only objections to the proceedings before the arbitrator and not the objections to the proceedings before the Court. This idea is very important in the construction of the first two clauses and the last general clause of para. 15 (c). This additional idea of Sulaiman, J. is also supported by Tyabji, J. in *D. Vijaya v. Venkatasubtarao* (14), where he observes. "The two decisions, viz, *Raja Narain v. Chodharain* (15) and *Ghulam v. Muhamad* (7), can be partially reconciled, if *Ghulam v. Muhamad* (7) is taken as deciding that the matter, on which the decision of the Court making the reference is final (provided it upholds the award), must be connected with the proceedings before the arbitrator: see paras 14 and 15." To sum up, the reasons advanced for the conclusion that appeal lies when the reference is invalid, in all the above views, are:

(a) para. 16 depends for its operation on para 15;

(b) para. 15 assumes a valid reference and only contemplates cases where propriety of the award on the basis of a valid reference is in question;

(c) para. 15 applies to objections to the proceedings before the arbitrator and not to objections to the proceedings before the Court;

(d) para. 16 depends for its operation on a valid reference under para. 1 as the want of jurisdiction at the start continues even if the Court disposes of objections to the award and purports to act under para 16.

6. As regards (a): it has already been shown that it is supported by *T. Wang v. Sona* (8), and that, what is meant thereby, is that the refusal to set aside the

(14) [1916] 89 Mad. 853=32 I. O. 881=30 M. L. J. 465.

(15) [1891] 13 All. 800=13 I. A. 55 (P. C.).

award referred to in para. 16, in order to vest the Court with jurisdiction to proceed to pronounce judgment, according to the award, must be one under para. 15, and if a refusal to set aside the award does not so come under para. 15, then the Court has no jurisdiction to take action under para. 16 and if the Court purports to take one, appeal will lie from the resultant judgment and decree, even though they are in terms of the award. None disputes, or can dispute, the correctness of the proposition that, on a refusal to set aside the award under para. 15, the Court can, under para. 16, proceed to give judgment and decree in terms of the award which decree is unappealable under para. 16 (2). But it is difficult to understand why the refusal is to be restricted only to refusal under para. 15. It is not the case that refusal can only take place under para. 15. As held by Mukerji, J., in *Seth v. Mamuji* (9), the Court has an inherent jurisdiction to set aside an award apart from para. 15. If it has such a jurisdiction, it has equally one to refuse to set aside. Setting aside an award, that is, granting an application for the same, under the inherent powers, can only take place on a ground not mentioned in para. 15. So also refusal to set aside, that is, refusing

the application for the setting aside, on a ground urged but not covered by para. 15, must necessarily be outside para. 15. Refusal of an application to set aside required by para. 16 can, then, very well be apart from para. 15. The words of Cl. 2, para. 16 (1), viz. "where no application is made to set aside the award or the Court refused such application," are general enough to include such case of refusal under inherent powers. Under these circumstances, the total absence of any specific reference to para. 15, in the said second clause, that is to say, the non-mention, in that clause of words like, "under para. 15," or, in manner aforesaid, which are to be found in respect of the first clause, is very significant. It shows clearly that the general expression of the said clause must carry its ordinary and plain meaning, and must include refusals not only under para. 15—it may be noted here that technically the refusal of the application to set aside takes place under para. 16 and not under para. 15 which is only concerned with setting aside the award—but also under inherent powers. This means that para. 16 is not controlled by para. 15. In this way this proposition (a) cannot be accepted as correct.

(To be continued)

Articles

A CRITICISM ON 'LAW versus JUDICIAL DISCRETION.'

(vide A. I. R. 1927 Journal 29.)

BY S. N. NARAHARAYYA, B. A. LL. M., Advocate, Bangalore City.

(Continued from A. I. R. 1927 Journal 60)

But even the sages of antiquity saw the impossibility of rigidly making this rule universal and had to make some margin in the application of dharma—which, to modernize the phrase, was to allow "law" to differentiate itself from dharma. Every act of ours affects another, and it is only a case of degree tangibility, or nearness or remoteness in point of place and time. But as there is a gradation in the practical dharma or "law" so what may be reprehensible from the point of dharma may be permissible from the point of "law." Thus

every act is viewed from the communal (samajika) point and it is determined whether it amounts to an offence, and if so what its magnitude is (and from a point of Dharma it would be a sin). Even the Penal Code distinguishes between murder and homicide, though from the point of injury done to society with the removing of the killed from its midst it makes no difference. It is in this that "the discretion of the sovereign or his deputies" was called into play and it was not arbitrary and was bound by all the rules of Dharma. It took into

account the nature of the person, place, time, gain or loss, caste, condition, sex, age, knowledge, habit, and all such things. A king had to be careful not to let his "rod" (danda) fall on the innocent or desist from letting it fall on the guilty on pain of infamy in this world and horrors of hell in the next. There is all the difference in the world between a mentality that thinks an act ends with the moment and another that believes its effect follows one even on death. The punishment a king had to inflict was often terrible it was supposed to cure the sin and yet he had to do it mercilessly in the interests of justice and order. Many a king has felt his own person loathsome to himself because he had to banish all mercy, tender feelings, and human instincts from his heart. It is one thing when law is practically the monopoly of judges and lawyers, and another, when every man knows law and can condemn the act of the king as unjust. The king was the instrument of dharma and often had to slay the culprit with his own hand and not to leave the task to the "common executioner" as an English judge does. The conviction of duty and dharma had to be so strong in him to exorcise the spectre of the slain from haunting his dreams and wakeful conditions. Besides he was not by nature blood-thirsty or bestial but was a fine product of nobility, goodness, culture, chivalry, and heroism. He was enthroned in the hearts of the people as an embodiment of godhead and was not a salaried judge holding office under good behaviour or will. He lived for the people, exposed himself to danger to keep them from harm, and served them as all their relations would to the extent Dharma permitted. The Indian mind is peculiar and is as hard at times as soft in general—hard at the rigid call of duty and soft at the tender dictates of generosity. It presents a strange contrast with the West now and in the ages past as well, e. g. Rama killed Ravana for the terrible wrong he had received at his hands, and, yet, before his body grew cold, persuaded his unwilling brother to perform his obsequies; but Achilles would not spare indignity to the body of Hector who had done him no personal wrong (and whose only fault was to have killed Patroclus, Achilles's friend, who opposed him on the open

field) though he begged and implored him before and after he fell to show it the consideration due to a warrior prince.

Yes, it was the duty of the king to administer justice. "Attaining to the idea of perfect justice" is impossible to the eye of our learned writer (for being conversant with the tendencies of the English common law he would like "to aim at practical good rather than theoretical perfection"—though what is but "theory" to-day may be "practical" to-morrow and what is "perfect" now be but "good" then), and if that is so it is because of the "administration" and reign of law" and not of Dharma. Law has got itself differentiated from morality according to the Western jurists (the former being nomology and the latter ethics), and an equity judge said that the devil itself doth not know the conscience of man. But Dharma is different and was practised for ages long, cheerfully and not out of compulsion, to be pleased rather than to please, in a society where godliness reigns supreme and to keep it as the watchword was not impossible. There was one class of persons living, and they were the very embodiment of Dharma in person and action, and, as the order went on descending Dharma became less and less rigid but more and more practical. There was also the inner standard in addition to the external, and self-restraint in addition to restraint from without. From a point of adjective law, there was divine evidence in addition to the human one, the former consisting of various forms of ordeal and the latter of documents, possession, and witnesses. In the absence of human evidence one could be asked, if the issue was sufficiently grave, to prove by ordeal, and unless he was foolhardy (such characters there were few in those days) the very notion of it struck the offending (or defaulting) person deep with fear, not so much of the pain the ordeal might cause but of the divine wrath that would surely overtake him and his family even if he could come out successful in it. The principle was that an innocent mind is the generator of a will-power that makes the body impervious even to destructive elements, the external circumstances contributing to danger being of course prevented. In addition the kith and

kin of the defendant (or accused), who might know the reality of the matter, would, in case of his false persistence, persuade him to yield and not be stubborn and bring the divine vengeance on them all. It could be conceded that there were no ideal kings at all times (even as all judges are not equally conscientious) but yet the justice they administered was not so imperfect as our learned writer characterizes. Shastras lay down that a king who is unaided, dull, of intellect uncultivated, and attached to sensual pleasures, cannot wield the rod of justice according to "law" (*nyaya*) but it requires one, who is pure, truthful, wise, and well assisted, and follows Shastras, to be competent to do so.

Well, those who assisted the king in the administration of justice were his judge, his ministers, his purohita, some Brahmans, and assessors. He had to follow Dharmashastra particularly divesting himself of anger and avarice, and no consideration of utility or statecraft could interpose. There was the general "law" of the land, and also conventional, customary, communal, and local laws, and also any by-laws made in accordance with Dharmashastra. When fresh territories were added to his kingdom by conquest or otherwise he had to respect even those special laws prevailing there, and, though the line of kings might change, the laws would ever remain the same. He was no maker of "law," but the "law" made him. Law sat above him and he had to loyally worship it. The second eighth part of the day was the time for attending to judicial trials, and the shortness of time reserved for it may not strike one that justice was nominal, summary, or something of the sort; for, considering the harmony in which people lived, and the settlement of the disputes by the people themselves, litigation itself was not much and complaints (or plaints) to the king were very few. It was the cool and the pleasant part of the day, when all the sloth due to sleep had completely gone and the spirit enlivened by attending to remittances and disbursements in the financial chamber during the first eighth part of the day. There could be no excitement due to hunger and thirst, apathy due to fatigue, and lethargy due to meal and drink-

ing. He was the *prekshaka* (looker-on) or president and was advised by the judge as to decision; i. e., the judge decided and the king gave his authority to it.

The qualifications of the king's assistants were these: a man of noble birth, (for heredity is superior to acquisition) who was well known for self-control, active habits, impartiality, firmness and devotion to duty, was selected for the judge's place, and being free from anger and, causing no agitation in other's minds, he discharged his duty keeping in view the fear of the next world. If the king attended he did but advise him as to decision, and in the absence of the king he presided himself and decided for the king. Learned persons born of illustrious families who were unruffled and pure of heart and actions were made ministers. The Brahmans were "advocates" of the cause, and there was one set of them attending the Court at the instance of the king, and one or one set (there was no limitation of number) brought by each of the parties. All of them were sheer advocates with this difference, that those brought by the parties advocated the justness of their respective client's cause while those attending the Court at the king's instance assumed a medium aspect in discussing the points at issue and the law relating to it. If either or both of the parties did not bring their "advocates," there were of course the Court advocates (i. e. those attending the Court at the instance of the king) and the case did not go unadvocated at all. To those whom he would ask to attend the Court the king extended gifts, honour, and good treatments and those brought by the parties could expect a "fee" (*dakshina*) of a certain fraction of the decretal amount or the interest at stake and it was of course borne by the parties themselves. The task of them all ended with "advocacy" and it was a Shastraic rule that either one should desist from attending a Court of trial or attending it should speak consistently on pain of sin for silence or improper talk. This held back the unqualified and even the qualified thought twice before they accepted the responsibility. The task of compelling or preventing the king to take, or refrain from, a particular course rested with the assessors who were also usually

Brahmans. So the advocates interested in the success of their party had to convince the assessors as to the justness of that party's cause. The assessors, again, were not chance people and none but such as had traditional learning and study, were proficient in the science of dharma, always firm to truth-speaking, and impartial to friends and foes, were chosen for the purpose. They were three, five, or seven according as the circumstances permitted or demanded, and when necessary a few merchants, and even goldsmiths who had the credit of character, antecedents, age, wealth, and non-jealousy were made additional assessors. The present day notions and conditions of a *purohita* may be disappointing, but formerly he was one who would look after the prosperity of his "clientele" and ward off any calamity that might threaten them. About the king's person his position was one of heavy responsibility inasmuch as the king after conferring with his ministers jointly and severally on all matters of state had to consult him (and be able to give the right advice) to decide the final course. He was proficient in all the worldly sciences relating to the welfare of the people and also in occult ones, and was, so to speak, the adviser final to the king (on pain of suffering for all the wrong acts of the king if he would not guide him aright). Thus was the Court, constituted (and it was a regular assembly of persons who had all the fear of the next world glaring in the face) and so the work was done, and yet could it be said that no justice was done when every member was anxious that the party shall not lose even a shell unjustly or as much as a hair on his head injured?

Whatever be the nature of the cause, civil, tortial, or criminal, neither the king nor his officers took the initiative, but fully confided in the people themselves to honestly do the needed justice in the matter. The party himself could be trusted to do justice to the aggrieved party and failing it (as was in exceptional cases) the latter could complain to the popular Courts, viz. (1) the family Courts, (2) the community Courts, (3) the congregation Courts, and (4) the village (or the township) Courts in the order of higher gradation. In civil matters the dues had to be paid or the status quo ante restored and in tortial

and criminal ones the loss of the aggrieved party had to be made good and the wrongdoer required to undergo punishment for committing injury. Failing the party and the popular Courts to do justice there was the king's Court as the last resort, and the weapon (sanction) of the popular Courts was excommunication while to fine or inflict other corporal punishment rested with the king. In criminal matters the offender had the choice of self-punishment and reforming himself and failing it the king's rod fell on him mercilessly. Yet in no case the principle "the wiper ought to be wiped out of the earth" or the retributive principle of life for life or limb for limb was pursued at the outset or as the only best way. Even "wipers" had their legitimate right to live in the world, and if they prove mischievous it is in the majority of cases you give them cause of alarm and they employ their natural weapon in self-defence. *Mens rea* was not the sole test of criminality, but went to determine the magnitude of the offence. It may often be a fleeting condition or fit, and writers of repute admit that under its influence men of high learning and station often kick a door because it does not readily respond to them, and so on. Such acts might produce any mischief uncalculated and yet their authors are not the defective whom society expects to come to its level at their peril. A congenital or habitual defect is one thing and a fleeting passion another and in such exceptional cases remedy and reform ought to be the rule and not retribution. This was exactly the case with the standard of life lived by the Hindus. They endured any amount of torture and persecuted themselves to cultivate, foster, and promote a force that would constrain them in the path of virtue and godliness, and if they committed a wrong it was under some such fleeting fit of passion from which no mortal is free, and they were the first to regret too and make reparation. The judges were not immune to punishment, and while they were punished heavily for any act of injustice actuated by bias, prepossession, or fear they habitually punished themselves (performed *prayaschitta*) for any unmeant or unconscious wrong in giving decisions. Thus "that august tribunal (the people)" were the "king's functionaries" and sat

in judgment on the conduct of all, or themselves formed the Courts without the necessity of the public or the king's functionaries strictly so called.

The procedure adopted does also throw a flood of light on the topic of how always the best justice was administered. A plaintiff (or complainant) could appear in person before the Court and state his case even in the king's presence. There were two statements, the preliminary statement and the final statement—the first to convince the Court of a *prima facie* case, and the second giving all the necessary particulars relating to it. In order to prevent awe and confusion natural to such a presence, gentle and encouraging words were given and his statement taken down—often elicited bit by bit—and his words and demeanour too well marked. The Court being satisfied that the subject-matter, the cause of action, and the parties were all right, notice (verbal or written or consisting of the royal seal) was sent to the other party. As a rule the defendant (or accused) had to appear in person and state his defence, but there were legitimate exceptions. The presence of the disease-stricken, infants, old men, men under difficulty, misfortune, trammels of duty, or distress, those whose affairs would seriously suffer, the afflicted, those engaged on king's errand or in festivities, the intoxicated, mad men, idiots, and servants, was not insisted upon though under exceptional circumstances even their presence was contrived without any harm or trouble to them or their masters, dependants, or affairs. Women were exempted, but the rule applied only to such as had no attendants about them, were young, of noble family whether young or old, were expecting confinement, had high qualities though of any caste, and were girls, while women on whom the family depended, who were profligates, prostitutes, had no family honour to boast of, and the fallen could be called. Those (men or women) who could not or need not appear in person were allowed to send agents, but they had to abide by their success or failure in the prosecution of the case. Those who could appear but would not, could be arrested and even in doing so there were strict rules not to cause irreparable damage to the party; e.g. one who was about to

marry could not be arrested, a tiller at the time of sowing, a cowherd while grazing his cattle, a soldier in a camp and so on.

The defendant being thus present or represented in the Court, the plaintiff (or complainant) was asked to make the final statement in his presence. It is one thing to complain against a person in his absence but another to do so in his actual presence. Should it differ from the preliminary statement in respect of subject-matter or cause of action, the case at once fell through and he was treated as a bad litigant. The final statement had to contain all the particulars, viz. the year, the month, the fortnight, the day, the hour, the place, the caste, the name, the amount, the number, the forbearance if any exercised by him and the reason therefor, any loss or pain he had endured, and so on, and therein anything unusual, undetrimental, meaningless, useless, unproveable or impossible was rejected. First a draft was made and after the necessary additions and deletions to make it full and exact it was transferred to paper and read out to the defendant, who had then to state his defence which was also drafted and taken down. The defence had to traverse the whole plaint and not a part of it or go more than it, and be valid, plain, consistent, and unequivocal. The words had all to be of common use, compounds easily reducible, constructions not involved, and sentences full and unelliptical. According to the nature of it, the defence was of four kinds: (1) admission (or confession), (2) denial (3) special plea, and (4) *res judicata*. In its manner it had to be free from doubt, relevant, relate to no different cause of action, be indiscrepant, reasonable, and contain no innuendo or require no explanation. No joinder of different causes of action or parties was allowed save in exceptional cases. The defence being taken down the Court conferred together and determined on whom the onus of proof lay and, called upon him to produce the evidence, and if it succeeded he succeeded and if it failed he failed. Thus the trial consisted of three stages: (1) the plaint (or complaint), (2) the defence, (3) the evidence, and (4) the decision, and between (2) and (3) there came

the determination of the onus of proof and after (4) the enforcement of the decree by the Court itself. The advantages of the system are obvious inasmuch as there were no intermediatories between the party and the Court in preparing the plaint (or complaint) etc., and the evils due to stirring litigation, toutism, professionalism, etc., were effectively avoided.

There were the general rules and some of the special rules may be summarized thus: when one had been sued (or complained against) by another, he could not bring a counter-suit or charge against the plaintiff (or complainant) for the obvious reason that it would embarrass him, and if he had really an action he could bring it after the first had been heard and decided. But in

case it was a quarrel, assault, or the like a counter charge was allowed for that would help to decide whose fault it was and what the punishment ought to be. Again a third party could not sue one who was already a defendant (or accused) in a case but had to wait (except when it would prejudice his case) till that was decided. The preliminary and final statements should not as a rule differ in material points though in civil actions any error of expression was excused while in criminal ones the party not only lost his case forthwith but was punished as a false accuser. Was this in any way behind the present law which assumes the innocence of the accused till the contrary is proved and in fact did it not go further and punish the false accuser *suo motu*?

(To be continued)

Reviews

The Indian Bar Councils Act by Mr. P. Krishna Nair, Bar. at. Law and Mr. P. Hari Rao, Vakil, High Court, Madras and published by the Madras Law Times Office, Madras. 1927 Edition—Over pp. 120, Price Rs. 3-8-0.

A commentary on the Act which is the first of its kind in India is welcome in the present state of the Bar in India. Though the powers of the Bar Council are not very wide still, as a first attempt towards making the profession free to govern its own domestic affairs, it ought to be worked. We are, however, afraid whether this little freedom is going to be allowed since we find that there is no Notification yet published by the Government of India that will enable the Act to be worked.

The Detection of forgery or A Study in Handwriting by Messrs. P. Ramanatha Aiyar and N. S. Ranganatha Aiyar, Trichinopoly. 1927 Edition—Over pp. 200—Price Rs. 6/-

As an original treatise the work under review cannot claim much merit. But as the authors have frankly stated "almost all available works on the subject have been consulted and referred to". Even a cursory reading of the book will convince the reader that within the short compass of a little over 200 pages a vast mass of much that is useful in every available work on the subject, is compressed. The foreword by Mr. J. C. Adam, Bar. at. Law and Public Prosecutor, High Court of Judicature at Madras is, both, interesting and instructive. It is a matter of common knowledge among the members of the legal profession that nine out of ten lawyers are unable to distinguish between a genuine and spurious expert. The authors have treated the subject of forgery in type-written documents in a special chapter and another chapter is devoted to finger prints. It is indeed difficult to name another work of the same kind wherein all available material is fully utilised.

THE ALL INDIA REPORTER

JOURNAL SECTION

1927]

[NOVEMBER

NOTES & COMMENTS

Indian Legislation—1927 Acts:

Second and Third Quarters.

ACT 5 OF 1927: THE INDIAN FINANCE ACT, 1927.

This is the usual finance Act fixing for the year duty on salt, postal rates, tariffs, stamp duties, income-tax and super-tax and other fiscal matters. Lawyers are specially interested in S. 5 of this Act which makes some important amendments in the Indian Stamp Act, 1899 with effect from the 1st July 1927. It is under this provision that the stamp duty on cheques and bills-of-exchange, payable on demand, is abolished with effect from 1st July 1927.

ACT 6 OF 1927: THE MADRAS SALT (AMENDMENT) ACT, 1927.

This Act makes a small amendment in S. 47, Madras Salt Act, 1889, enabling the Central Board of Revenue to fix the percentage of duty leviable in respect of the charges payable towards the cost of the preventive establishment.

ACT 7 OF 1927: THE PROVIDENT FUNDS (AMENDMENT) ACT, 1927.

Section 2, Cl. (d), Provident Funds Act 19, 1925, defined the words "Government Provident Fund" as a provident fund other than a railway provident fund, constituted by the authority of the Government for any class or classes of its employees or teachers in educational institutions. This definition, while it gave the benefit of the Act to teachers in educational institutions, excluded from such benefits persons other than teachers employed in educational institutions or by bodies engaged in educational work. This amending Act confers upon all "persons employed in educational institutions or employed by bodies existing solely for educational purposes" the benefits of the Act.

1927 J/9b/4 & 10 a/4

ACT 8 OF 1927: THE SEA CUSTOMS (AMENDMENT) ACT, 1927.

This provides for abatement of duty in respect of certain classes of deteriorated goods.

ACT 9 OF 1927: THE INDIAN LIMITA- TION (SECOND AMENDMENT) ACT, 1927.

This amending Act, which comes into force on the 1st of January 1928, effects a very important alteration in the law of limitation. Section 2 of this amending Act is as follows:

AMENDMENT OF ART. 182, SCH. 1, ACT, 9, 1908.

In the Third Division of the First Schedule to the Indian Limitation Act, 1908, in Art. 182—

(a) in Cl. 5 of the entry in the third column, for the word "applying" the words "the final order passed on an application made" shall be substituted; and

(b) for Cl. 6 of the same entry the following shall be substituted, namely:

6. (in respect of any amount, recovered by execution of the decree or order, which the decree-holder has been directed to refund by a decree passed in a suit for such refund) the date of such last-mentioned decree or, in the case of an appeal therefrom, the date of the final decree of the appellate Court or of the withdrawal of the appeal.

There has been a good crop of litigation and case-law by reason of time being saved by the making of an application irrespective of the question whether the application was duly prosecuted or not. The Civil Justice Committee in para. 4, Chap. 30 of their report, said, at p. 403 as follows: "This, however, does not seem to us to be a sufficient reason for maintaining a very cumbrous procedure of Art. 182. If, however, the article is to continue as it is and inter-

mediate petitions are still to be required, we think that the period of three years should begin not from the date of the last application, but from the date of the last order on such a previous application. Opinion is practically unanimous on the latter point." We are sure that this amendment will make decree-holders more active and will reduce to a considerable extent the work of our civil Courts in the execution department. In view of the amendment of Cl. 5, the present Cl. 6 becomes redundant. The legislature has, therefore, omitted Cl. 6, which makes the date of issue of the notice as the starting point and in its place a new Cl. 6 is introduced.

ACT 10 OF 1927: REPEALING AND AMENDING ACT 1927.

This repealing and amending act makes several formal amendments to various Acts to give effect to subsequent legislation and to incorporate proper verbal changes in view of legislation bearing upon the subject-matter of the respective statutes. Most of the changes now made are due to the constitution of the Royal Air Force. Some amendments are necessitated by the constitution of new High Courts and the issue of Government notifications under enabling Acts.

From the lawyer's point of view a very important amendment is effected by the amendment of the Transfer of Property Amendment Act 1926, Act 27, 1926. The repealing and amending Act provides as follows: In S. 2, in the definition of the word 'attested', after the word 'means' the words 'and shall be deemed always to have meant' shall be inserted." By this amendment retrospective effect is given to Act 27, 1926. Our readers may recollect that Act 27, 1926, which came into force on the 25th March 1926 defined the word "attested" and amended S. 3 by incorporating the definition of the word "attested." This Act was passed to nullify the effect of the Privy Council decision in *Samu Pather v. Abdul Kader*, I. L. R. 35 Madras 607. The question whether Act 27, 1926, is retrospective in its operation under the beneficial rule enacted in respect of instruments executed prior to 25th March 1926 was naturally a moot point that was bound to come up for decision. The Allahabad High Court had to consider this question in *Girja Nandan Kalwar v. Hanuman Das Marwari* and a

Full Bench of five learned Judges was constituted to determine the question. The decision of the Full Bench is reported in I. L. R. 49 Allahabad, at p. 25 and in A. I. R. 1927 Allahabad, p. 1. Three learned Judges took the view that the Act was not retrospective in operation, and the other two learned Judges came to the opposite conclusion. The legislature, therefore, did well in losing no time to put the matter beyond doubt by enacting that the Act has retrospective operation. In view of the majority of the Full Bench taking the contrary view the matter has been rightly dealt with by the legislature.

ACT 11 OF 1927: THE INSOLVENCY (AMENDMENT) ACT, 1927.

Section 10, Provincial Insolvency Act 5, 1920, provided in sub-Cl. 2 a penalty for a debtor not applying for his discharge after adjudication or, having applied, not prosecuting his application, by enacting that he shall not be entitled to present an insolvency petition subsequent to such failure without leave of the Court. The Presidency Towns Insolvency Act, 1909, did not contain a similar provision. The amending Act amends S. 14, Act 3, 1909, by incorporating therein a provision similar to S. 10, Act 5, 1920. The amending Act provides for certain other consequential amendments bringing the Presidency Towns Insolvency Act into line with the Provincial Insolvency Act in this matter. Default made in insolvency proceedings under either of the two Acts will be a bar to a fresh application for adjudication under the other Act.

ACT 12 OF 1927: THE REPEALING ACT, 1927.

This is a formal piece of legislation to give effect to the several repealing provisions enacted from time to time under various Acts. There is nothing of practical interest to the lawyer.

ACT 13 OF 1927: THE INDIAN BAR COUNCILS (AMENDMENT) ACT, 1927.

The amendment of S. 8, Act 38, 1926, provides for the determination of questions of seniority among advocates. It is now laid down that entries in the roll shall be made in the order of seniority, and such seniority shall be determined as follows, namely:

(a) All such persons as are referred to in Cl. (a) sub-S. (2), shall be entered first in the

order in which they were respectively entitled to seniority inter se immediately before the date on which the section comes into force in respect of the High Court; and

(b) The seniority of any other person admitted to be an advocate of the High Court under this Act after that date shall be determined by the date of his admission or, if he is a barrister, by the date of his admission or the date on which he was called to the Bar, whichever date is earlier:

Provided that, for the purpose of Cl. (b), the seniority of a person who, before his admission to be an advocate, was entitled as of right to practise in another High Court, shall be determined by the date on which he became so entitled.

The proviso to S. 2 of the amending Act gives to the Advocate-General the right of pre-audience over all other advocates and to King's Counsel the right of pre-audience over all advocates except the Advocate-General.

Section 9, sub-S. (4) is amended by the addition of the words "or to prescribe the conditions under which such persons shall be entitled to practise or plead" after the words "any such application" at the end of the sub-section. This amendment leaves unaffected the powers of the High Courts of Calcutta and Bombay, not only to prescribe the qualifications to be possessed by the persons applying to practise in those High Courts respectively in the exercise of their original jurisdiction or the powers of the said High Courts to grant or refuse, as they think fit, any such application, but also expressly recognizes their right to prescribe the conditions under which such persons shall be entitled to practise or plead. This amendment would virtually perpetuate the system of dual agency that now obtains in the said two High Courts as far as original side work is concerned.

ACT 14 OF 1927 : THE INDIAN MERCHANT SHIPPING (AMENDMENT) ACT, 1927.

This amending Act is intended to provide for certain matters relating to pilgrim traffic. Shipping companies are put under certain restrictions in the matter of the conveyance of pilgrims and provision is made to secure reasonable comfort and convenience to pilgrims. Provision is also made for the appointment of pilgrim officers for the protection of pilgrims. This Act is apparently intended to give adequate protection facilities to Haj pilgrims.

ACT 15 OF 1927 : THE INDIAN DIVORCE (AMENDMENT) ACT, 1927.

In the Indian Divorce Act 4, 1869, a new section is added as S. 17-A, which enables the Governor-General in Council to appoint for each High Court of Judicature established by Letters Patent an officer who shall have the like right of showing cause why a decree for the dissolution of marriage should not be made absolute or should not be confirmed, as the case may be, as is exercisable in England by the King's Proctor. The section further enables the Governor-General in Council to make rules regulating the manner in which the right shall be exercised and all matters incidental to, or consequential on, such exercise.

ACT 16 OF 1927 : THE INDIAN FOREST ACT, 1927.

This is an Act to consolidate the law relating to forests, the transit of forest produce and the duty leviable on timber and other forest produce. Chapter 1 contains the definition section and some other formal matters. Chapter 2 contains provisions relating to reserve forests and lays down the powers and duties of forest settlement officers. The same chapter contains provisions relating to the rights of the public and provisions relating to the adjudication of claims by the forest settlement officer and of appeals from such orders. Certain forest offences are defined and the penalties are provided. Chapter 3 relates to village forests. Chapter 4 relates to protected forests. Chapter 5 provides for control over forest and lands not being the property of the Government. Chapters 6, 7 and 8 relate to the duty on timber and other forest produce, and their control in transit and the collection of drift and stranded timber. Chapter 9 is exclusively devoted to penalties and procedure in respect of offences under the Act. The remaining four chapters in the Act contain provisions relating to cattle trespass, forest officers, rule-making powers of the Local Government and other miscellaneous matters. This being a consolidating enactment the schedule shows that all the previous enactments are repealed. The Indian Forest Act, Act 7, 1878, having been in force so long and there having been as many as six amending Acts prior to the present consolidation

it may be necessary for legal practitioners who may have to deal with forest questions to make a careful study of this Act.

ACT 17 OF 1927 : THE INDIAN LIGHTHOUSE ACT, 1927.

This is an Act to consolidate and amend the law relating to the provision, maintenance and control of lighthouses, by the Government in British India.

ACT 18 OF 1927 : THE INDIAN SUCCESSION (AMENDMENT) ACT, 1927.

Under Ss. 223 and 236, Indian Succession Act, 1925, a married woman was under a disability in the matter of obtaining probate or letters of administration without the previous consent of her husband. This disability is now removed by the amendment of Ss. 223 and 236, Indian Succession Act, by the deletion therefrom of the words "nor, unless the deceased was a Hindu, Mahomedan, Buddhist, Sikh, or Jaina or an exempted person, to a married woman without the previous consent of her husband".

An important amendment is also made to the Married Women's Property Act 3, 1874. The following section is added as S. 10.

Where a woman is a trustee, executrix or administratrix, either before or after marriage, her husband shall not, unless he acts or intermeddles in the trust or administration, be liable for any breach of trust committed by her, or for any misapplication, loss or damage to the estate of the deceased caused or made by her, or for any loss to such estate arising from her neglect to get in any part of the property of the deceased.

This would give to the husband the immunity to which he will be entitled under the scheme of the Act which gives privileges to married women by emancipating them from the old rules of the common law.

ACT 19 OF 1927 : THE PRESIDENCY TOWNS INSOLVENCY (AMENDMENT) ACT, 1927.

Section 2 of the amending Act amends S. 7, Act 3, 1909, by incorporating therein a proviso to the effect that the power given under S. 7 is subject to the procedure and the limitations prescribed under S. 36 of the same Act. S. 3 of the amending Act incorporates a new sub-section to S. 15, numbered as S. 15 sub-S. (3), which makes it obligatory on the debtor to produce all his books of account and to file such lists of creditors

and debtors and to afford such assistance to the Court as may be prescribed on the making of the order admitting his petition, subject to the penalty of his petition being dismissed on his making default. S. 4 of the amending Act amends sub-Ss. (4) and (5) of S. 36 of the said Act by the substitution of the words "if on his examination any such person admits" in the place of the words "if, on the examination of any such person, the Court is satisfied."

Section 5 of the amending Act confers upon the rule-making authority power to make rules relating to the filing of lists of creditors and debtors and the affording of assistance to the Court by the petitioning debtor.

These amendments were found necessary by the need that was keenly felt for compelling the insolvent debtor to be vigilant and to give such assistance to the Court and to the official assignee as may lie in his power for the expeditious disposal of the matter. It is hoped it will not be possible hereafter for the fraudulent insolvent person to get the protection and the benefit of the insolvency law and thereafter to be indifferent in the matter of complying with the requests of the official assignee.

ACT 20 OF 1927 : THE BAMBOO PAPER INDUSTRY PROTECTION ACT, 1927.

This is a tariff Act intended to give protection to the bamboo paper industry.

ACT 21 OF 1927 : THE INDIAN SECURITIES (AMENDMENT) ACT, 1927.

This contains some formal amendments to the Indian Securities Act 10, 1920. S. 10 of the Act is amended by making it applicable to stolen securities also. A new section is enacted as S. 18-A, which runs as follows :

Save as otherwise expressly provided in the terms of a Government security, no person shall be entitled to claim interest on any such security in respect of any period which has elapsed after the earliest date on which demand could have been made for the payment of the amount due on such security.

ACT 22 OF 1927 : THE SOCIETIES REGISTRATION (AMENDMENT) ACT, 1927.

Societies for the diffusion of political education can be also now registered. This change in the law is now effected by the insertion of the words "the diffusion of political education" after the words "diffusion of useful knowledge,"

in S. 20, Societies' Registration Act 21, 1860.

ACT 23 OF 1927 : THE INDIAN TARIFF COTTON YARN (AMENDMENT) ACT, 1927.

This Act introduces some slight changes in the tariff rates.

ACT 24 OF 1927 : THE INDIAN TARIFF (AMENDMENT) ACT 1927.

This Act introduces some changes in the schedule to the Indian Tariff Act.

ACT 25 OF 1927 : THE CRIMINAL LAW (AMENDMENT) ACT, 1927.

This is the well-known blasphemy Act passed to put down scurrilous abuse intended to outrage religious feelings of any class by insulting its religion or religious beliefs. This is the outcome of the decision of the Lahore High Court in what is commonly known as the *Rangila Rasul* case.

After S. 295, I. P. C., the following section is added as S. 295-A :

295-A. Whoever, with the deliberate and malicious intention of outraging the religious feelings of any class of His Majesty's subjects, by words either spoken or written, or by visible representations, insults or attempts to insult the religion or the religious beliefs of that class shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Consequential amendments are also made to the Criminal P. C.

ACT 26 OF 1927 : THE CANTONMENTS (AMENDMENT) ACT, 1927.

This Act amends the Cantonments

Act 2, 1924 in various minor particulars not of general interest.

ACT 27 OF 1927 : THE INDIAN EMIGRATION (AMENDMENT) ACT, 1927.

A small amendment is made to the Indian Emigration Act 7, 1922 by giving a definition of an "emigrant ship" and by making some minor changes in S. 24, sub-S. (2), Cls. (h) and (k).

ACT 28 OF 1927—THE INDIAN INCOME-TAX (AMENDMENT) ACT, 1927.

Section 59, Indian Income-tax Act 11, 1922 is amended by the insertion of a new sub-section after sub-S. (2). The new sub-section provides that in cases falling under Cl. (a), sub-S. 2, where the income, profits and gains liable to tax cannot be definitely ascertained or can be ascertained only with an amount of trouble and expense to the assessee, which in the opinion of the Central Board of Revenue is unreasonable, the rules made under that sub-section may prescribe methods for making an estimate for the purposes of assessment. This amendment will be of special use where it becomes necessary to assess on an estimate incomes derived in part from agriculture and in part from business, or incomes of insurance companies, or of persons residing out of British India.

Husainbhai v. Bhansilal : A. I. R. 1924 Nagpur 338

By M. G. SHIRSALKER, Pleader, AKOLA

(Continued from A. I. R. 1927 Journal 63.)

7. Proposition (b) :

The observations of which this is a part are : "If there is no valid agreement to form the basis of a reference under para. 1, Sch. 2, of the Code, there is no valid award whereon a decree can be based in accordance with para. 16. Reference has, however, been made to para. 15 to show that this is not expressly mentioned as one of the grounds on which the Court can be invited to set aside the award. This may be conceded ; but para. 15 obviously assumes a valid reference and only

contemplates cases where the propriety of the award on the basis of such a reference is in question. Where, however, the jurisdiction of the Court is called in question, the Court has jurisdiction to decide that it had acted in contravention of the statute and consequently without jurisdiction." The very first sentence wherein it is said that there is no valid award whereon a decree can be based under para. 16 would seem to show that, according to the learned Judge, para. 16 requires a valid award, but his later observation that para. 15 as-

sumes a valid reference shows that he wants to restrict the term "no valid award" in that sentence to those invalid awards which are such 'for want of the invalidity of the reference. Even this term of the invalidity of the reference is also as general as that of the invalidity of the award and cannot be distinguished in principle from the latter. Reference is invalid under para. 1 not only for want of joinder of the parties interested, but also : (1) for want of the legality of the agreement as in *D. Vijaya v. Venkata* (14), where the same was not sanctioned under O. 32, R. 7, as in *Kaliprosanna v. Rajani* (16), where the agreement was obtained by fraudulent concealment of the fact that the arbitrator was the retained pleader of one of the parties ; (2) where the subject-matter of reference was not competent for reference as in *Ganoba v. Narayan*, *A. I. R. 1923 Nag. 112*, and *T. Wang v. Sona* (8). Thus the general term "invalid reference under para. 1" must include all these cases.

The next thing to be observed in connexion with these remarks of Mukerji, J., is that he conceded that para. 15 does not specifically mention this (i. e., invalidity of the reference) as one of the grounds for setting aside the award, in any of its sub-Cls. (a), (b) or (c). This is evidently the most important link in the whole chain of reasoning. It has led the learned Judge to hold that para. 15 assumes a valid reference and only contemplates cases where the award proceeds on such a reference, and to hold further that in cases where the reference is valid, the Court can set aside the award only under its inherent powers. It is no doubt true that para. 15, which expressly says that no award shall be set aside except on the ground of (a) misconduct or corruption of the arbitrator, (b) fraudulent concealment or wilful misleading or deceit by the parties, (c) of the award being made after supersession or after time allowed by the Court or the award being otherwise invalid, does not expressly refer to invalid reference as one of the grounds but it does not necessarily follow from the same that the omission necessarily leads to the inference that para. 15, assumes a valid reference. The said inference is no doubt possible but it has the evident drawback of creating a

necessity for invoking the inherent powers of the Court of first instance for setting aside the award vitiated on this ground, on the ground that there is no provision of law for the same. Such a position of no provision is evidently against the policy of the Code to be exhaustive in matters in respect of which it declares the law : *Gokul Mandar v. Padmanand* (17). This is especially so when the intention of the legislature in inserting the words "or otherwise invalid" in para. 15 (c) is, in the words of Kinkhede, A. J. C. in *Shankar v. Chunnimal*, *A. I. R. 1926 Nag. 37*, "to meet the difficulty felt in *Kali v. Rajani* (16)" (where the reference was invalid because the agreement was obtained without disclosing the fact that the arbitrator to be appointed was the retained pleader of one of the parties) "so as to enable either party to have the award set aside if he considers the award invalid on any ground." This amendment according to this learned Judge, "gives full and complete jurisdiction to the Court to set aside the award after hearing all sorts of objections." Besides, the words "otherwise invalid" are quite clear in their meaning so as to include an award invalid because the reference is invalid, and if they are taken in this their ordinary meaning, the omission referred to by Mukerji, J., becomes immaterial and the need of drawing upon the inherent powers of the Court is obviated. In this way the said omission, being due to a specific general provision to be found in para. 15 (c), cannot lead to the inferences drawn by Mukerji, J. So far as authority on the point is concerned, Kinkhede, A. J. C., himself is against Mukerji, J., for he observes in this *Nagpur* case at p. 341 col. 1 : "In other words plaintiff's objection came within para. 14 (c), Sch. 2, and if this objection were upheld, the award was liable to be set aside under para. 15 Cl. (c) on the ground of the award being 'otherwise invalid'." In the same way *Kaliprosanna v. Rajani* (16) and *Usuf v. Riyasat*, *A. I. R. 1926 Oudh 308* are against the Calcutta interpretation of para. 15. In this way it is submitted with due deference that the remarks of Mukerji, J., are unsound.

(16) [1898] 25 Cal. 141.

(17) [1902] 29 Cal. 707=29 I. A. 196=6 C. W. N. 825=8 Sar. 328 (P. O.).

8 *Proposition (c)* :—This proposition is taken from the remarks made by Sulaiman, J., in *Gopaldas v. Baijnath* (11). He says: "Where objections are raised as to the proceedings before the arbitrator and they are the subject of a decision by the trial Court, it cannot be suggested that there has been any irregularity committed by the Court in the exercise of its jurisdiction. Such objections, therefore, cannot be properly raised again in revision. But when the appellant challenges the proceedings of the Court itself, and attacks a reference made by the Court to the arbitrator, it is not merely a question of a wrong decision by the Court but may be one of irregularity or illegality committed by it in the exercise of its jurisdiction." These remarks, though made in a revision and not in an appeal are entitled to consideration in so far as they interpret para. 15. In this respect, they are evidently wider than those of Mukerji, J., who excluded only invalid references from para. 15. They are similar to and as extensive as the remarks of Kotwal, A. J. C., to the effect that a decree under para. 16 must be one which has been passed after substantial compliance with the preceding provisions of the schedule, and as such the wider aspect is not so relevant but the underlying idea that the series of orders of the Court under paras. 1 to 14 cannot be brought within the purview of para. 15 will have to be considered here.

Obviously the above remarks of Sulaiman, J., or rather the idea underlying those about the interpretation of para. 15 are not based on the omission referred to by Mukerji, J., for he divides the decisions of the trial Court into two classes viz., (1) those relating to objections to the proceedings before the arbitrator, and (2) those relating to objections to the orders of the Court under the preceding provisions of the schedule. So his interpretation of para. 15, although of the same inferential character as that of Mukerji, J. seems to be based either on a jurisprudential idea of his own about the finality-principle in arbitration cases or on his idea about the interpretation of the words "otherwise invalid" as suggested by his reliance on *Kanhayalal v. Jaganath* (13). The first inferential hypothesis has not a word to support it in para. 16. Moreover when the learned Judge in his

immediately next remark says that "the learned counsel has relied on the case of *Ajudhia v. Badar* (12), where a learned Judge of this Court did observe that the objection to the validity of the reference ought to be raised under para. 15" and relying on a contrary observation in *Kanhayalal v. Jaganath* (13), dissents from the observation in 39 All. 489. This shows that he considers that if an objection to the order of reference can be a matter for the Court's decision under para. 15, that is a complete reply to his view. Thus it is clear that the learned Judge did not want to put forward his own idea of finality but has simply the interpretation of para. 15 in view, to settle whether orders of reference can be a subject for decision for the trial Court under para. 15. On this point also unfortunately he gives no definite reasons for his view. He simply relies on *Kanhayalal v. Jaganath* (13). The observations in this case are: "But reasoning mainly from that expression (i. e., "otherwise invalid"), the members of the Court in *Lalawan v. Latchiya* (18-19), were unanimous in saying that the original Court and no other should decide any objection to the award on the ground of invalidity from any cause whatever. That is to say that the words "otherwise invalid" must not be construed as *eiusdem generis* with what has gone before it. Accepting to the full that construction, it is necessary to point out that some limitation must be placed upon the words so construed. They cannot mean that a decision merely adopting an idle or wanton objection, however absurd or irrelevant, would be a decision of invalidity from any cause whatever." He can therefore be supposed to say that as the two clauses preceding the general clause of "otherwise invalid" in para. 15 (c), are relating to the objections to the proceedings before the arbitrator, the general clause also must be held to refer to the same proceedings. This way of arguing has certainly the merit of applying a well-known principle of the construction of law and carries more weight than a mere inferential reasoning. So far as authority on the point is concerned, not only *Lalawan v. Latchiya* (18-19) but Kinkhede, A. J. C., himself is against it.

(18-19) [1914] 826 All. 69=21 I.C. 989=12 A. L. J. 57.

He observes in this very case at page 341: "In other words the plaintiff's objection came within para. 14, Cl. (c) Sch. 2, and if this objection were upheld, the award was liable to be set aside under para. 15, Cl. (c) on the ground of the award "being otherwise invalid." In another case decided by him later on and reported in *Shanker v. Chunnilal*, A. I. R. 1926 Nag. 37, he held: "the object of adding the words "or otherwise invalid" was to meet the difficulty felt in *Kaliprosanna v. Rajani* (16), so as to enable either party to have the award set aside if he considers the award invalid on any ground. This amendment gives full and complete jurisdiction to the Court to set aside the award after hearing all sorts of objections." In *Ram Pratap v. Durga Prasad* (20), their Lordships have held that where the arbitrators not complying with the order of reference give an award which dealt with matters outside the suit and also between parties to suit and a stranger, and was hence ultra vires of the arbitrators, the trial Court can treat such an award as "otherwise invalid" and set it aside. If then, an award ultra vires of the arbitrators because they dealt with matters beyond the reference cannot be distinguished in principle from an award invalid because the reference was invalid, then, it is clear that the Privy Council is against the view propounded by Mukerji, Sulaiman, and Tyabji, JJ. No doubt in these cases, the rule of *ejusdem generis* has not been specifically discussed, but it is difficult to suppose that the rule, had it been really applicable here, would have escaped the notice of these Courts. Besides, as held in *Balaji v. Gopalrao* (21), and in *re Kolhatkar* (22), the object of the particular provision being material in this respect, and the object of the words "or otherwise invalid" being as stated in *Shanker v. Chunnilal*, A. I. R. 1926 Nagpur 37, the rule has no scope here and the words must be given an unrestricted interpretation which they prima facie admit. However, apart from these authorities, even supposing that the rule of *ejusdem generis* applies here, it is difficult to understand

why the first two clauses of para 15 (c) be considered as relating solely to proceedings before the arbitrator; for, under these clauses questions not only about the passing of the award by the arbitrator at a particular time, but also about the legality of the order of supersession or about the meaning of any expression, say for example, the word "issue" in the first clause arise and the proceedings before the Court may equally be in question. The correct classification would be that para. 15 (a) applies to the personal conduct of the arbitrators, para. 15 (b) to that of the parties, and para. 15 (c) to the judicial proceedings either before the Court or the tribunal of the arbitrator. In this way the conclusion or proposition that para. 15 does not apply to objections to the validity of the reference is wrong.

9 Proposition (d) is the amalgamation of the dictum in *T. Wang v. Sona* (8) with the underlying idea drawn from the Nagpur reasoning. The argument contained in this is that when the Court has no jurisdiction at the time of ordering the reference as para. 1 was not complied with, it cannot have one at any later stage with or without the consent of parties. To speak with reference to the facts in the Nagpur case, the Court, not having jurisdiction at the time of reference, has none when it gave judgment on the basis of such reference. The jurisdiction of the Court to give judgment arises under para. 16 and so, if the matter is to be restricted to this paragraph alone, which should ordinarily be the case, then it is clear, as shown in para. 4 above that jurisdiction under para. 16 depends on only three conditions, viz: (1) the Court should see no cause to remit the award; (2) there should be no application to set aside the award, or if there is any, the Court has judicially refused the same; and (3) the judgment should be given after time for making such application has expired. No condition about the Court having jurisdiction at the time of reference or at any time prior to any action under para. 15 is mentioned. Evidently the argument in question is based on the general rule of jurisprudence that a judgment by a Court without jurisdiction is void. As a general rule no objection can be taken to the same. But like all other rules of jurisprudence, it is not absolute

(20) A. I. R. 1925 P. C. 203=53 Cal. 258=53 I. A. 1 (P. C.)

(21) [1916] 12 N. L. R. 51=33 I. C. 489.

(22) [1910] 6 N. L. R. 129=8 I. C. 282=11 Cr. L. J. 615.

To take a concrete instance of such exception, under the Provincial Small Cause Courts Act, a Small Cause Court is empowered to try certain suits. If, however, it tries a suit not of a small cause nature and decides the same, can it be said that for want of jurisdiction, the decree is one of an ordinary civil Court and as such appealable? The fact is that a Court of justice empowered to decide a cause has power to decide whether it has jurisdiction to decide particular cause: *Hriday v. Ram* (23). And a power to decide means to decide rightly or wrongly. Even when the jurisdiction is not questioned and consequently there is no actual decision of the Court on the point there also the Court will be deemed to have decided in favour of its jurisdiction. No doubt such a decision about jurisdiction, if wrong, is not such as cannot be questioned, but it can only be questioned in the manner provided by the legislature. The statute may or may not provide a remedy of appeal. The subject has no inherent right to it. If an appeal, then, is prohibited, then, the decision of the trial Court is final. This is exactly the case here. Under para. 15, the Court is empowered, as already shown, to decide not only whether the reference is valid, that is, to decide whether it had jurisdiction at the start, but also whether all subsequent orders under paras. 2 to 14 are valid so as not to effect the award, rightly or wrongly, in favour of or against the jurisdiction. If it so decides in favour of jurisdiction, then para. 16 gives it complete jurisdiction to give an unappealable judgment and decree. Thus the exception to the general rule applicable to the present case is that the legislature has deliberately made the question of jurisdiction not only decidable by the trial Court, but also has made the Court's decision of the same unappealable. That the general rule is not absolute is clear from *Hriday v. Ramchandra* (23). In this way the argument under discussion is unsound, not only in relation to para. 1, but all other paragraphs where a question of jurisdiction is involved as under para. 15 or inherent powers.

10. In this way, all the arguments

(23) [1920] 31 O. L. J. 482=58 I. C. 806=24 O. W. N. 723 (F. B.).

based on outside considerations to support the conclusion, that when the reference is invalid, the decree based on it is not one under para. 16, and hence as appealable, having failed, the conclusion cannot stand.

AUTHORITY OF GHULAM V. MUHAMAD (7) UNDER THE PRESENT CODE.

11. The Privy Council decisions being supreme and binding on all Courts in India, they like statutory provisions have often been themselves matters of interpretation to the Indian Courts which, not unusually, exhibit a conflict of opinion in this matter. Of the several such decisions of the Judicial Committee, on which conflict in India has raged, *Ghulam's* case is one. The decision is given under the old Code of 1882, and the conflict under the same is described by Krishnaswamy Aiyar, J., in *Surya Narayanrao v. Sarabhiah* (6) in his referring order as follows: "There has been considerable difficulty in understanding this decision of the Privy Council. * * * *"

It seems difficult to cut down the generality of the language employed by the Privy Council at page 183 of the report more specially as their Lordships expressed their entire concurrence (see page 185) with the decision of the Chief Court of the Punjab. It may be said that the case before the Privy Council was not itself one which raised a dispute as to the factum of submission or as to the reality of the award (see pages 177-178), and the general observations, though intended as a guide to the Courts in India, cannot be treated as an authoritative decision governing a case where the question raised is whether there is an award in law. The decision of the Punjab Chief Court, in which full concurrence is expressed by their Lordships, deals expressly with the cases where a dispute is raised as to the factum of the submission or the existence of the award in law: (see pages 174, 175 and 176.) Their Lordships of the Privy Council cannot, therefore, be deemed to have been unaware of the exact limits to which their decision would be extended.

But the chief difficulty in defining the exact scope of their Lordships' decision lies in the previous decision of the Judicial Committee in *Raja Narain*

v. Choudharain (15) to which no reference appears to have been made in the argument, and which is not alluded to in the judgment of their Lordships in *Ghulam v. Muhamad* (7). In that case upon a reference to arbitration in a pending suit an award was delivered by the arbitrators after the time limited by the Court. It was an invalid award under the last paragraph of S. 521. But the Court passed a decree in accordance with the award without objection by either party as regards the delivery of the award being beyond time, and on appeal the decree was confirmed by the High Court. The Privy Council set aside the decree passed in accordance with the award, apparently holding that an appeal lay, though no particular observations are found in the judgment of their Lordships on the question of the competency of appeal.

* * * The award being delivered beyond time is not a case of the decree being in excess of or not in accordance with the award under S. 522. If we recognize that as an exception, is that to be the solitary case outside the last clause of S. 522? Now an award remitted under S. 520 becomes void on the refusal of the arbitrators to reconsider it: see the first clause of S. 521. But suppose in such a case the Court passes a decree in accordance with the void award (and the decree in such a case would not be in excess of or not in accordance with the award) can it be said that no appeal lies? It is certainly a worse case than the one falling within the last clause of S. 521. If both these cases, then, are exceptions and covered by the last clause of S. 522, how can we distinguish from them in principle the cases of no submission at all and of no award in law, which before the Privy Council decision were treated as raising questions fundamental with reference to the jurisdiction of the Court passing a decree and, therefore, open to appeal apart from the grounds mentioned in the last clause of S. 522. * * *

The questions that arise (in the present case) are only with reference to there being an award in law, i. e., whether after supersession a valid award could be made, and whether the two new arbitrators were validly appointed and an award by them and three of the old was a valid award? The first question

falling under Cl. (c), S. 521 may be deemed to be concluded. But the next raises more difficulty. The Courts in India have been considerably perplexed over the real import of the Privy Council decision in *Ghulam v. Mohamed* (7). In *Romesh v. Karunamoyi* (24) it was held that two out of the three arbitrators named only having signed the award and the third only in Court after it was filed, an appeal lay from the decree passed on the award, and the decision of the Privy Council was explained as not affecting the right of appeal. In the same volume however, *Chairman of Purnea Municipality v. Siva* (25) Maclean C. J. and Mukerjee, J., held that no appeal lay, following the decision of the Privy Council, though it was contended that the submission under S. 506 was not valid, it having been made only by the plaintiff and the defendant 1 and defendants 2 to 5 not having joined in it. It may be that defendants 2 to 5 were unnecessary parties as pointed out at page 902. But the decision itself proceeds on the broad ground that the appeal from the decree was limited to the cases mentioned in the last clause of S. 522. It may also be pointed out that in the case of *Chintamani v. Haldhar* (26), which Chief Justice Maclean followed, Mr. Justice Mukerjee expressed himself in doubtful language as regards the limitation of the right to appeal to the grounds mentioned in S. 522 in cases falling under Ss. 523 and 525: see page 161. Chief Justice Maclean himself in *Nadirchand v. Gobind Chand* (27) expressed his inclination not to limit the appeal to the ground mentioned in S. 522 at page 65 of the report. The value, therefore, of *Chairman Purnea Municipality v. Siva* (25) is somewhat impaired by the decisions in 2 C. L. J. The Allahabad Court, in Full Bench [*Behari v. Chunnilal* (28)] following the decision of the Privy Council held that no appeal lay from the decree following the award on the ground of the misconduct of the arbitrators. They did not pronounce the decision in *Shamlal v. Misri* (29) to be erroneous;

(24) [1906] 83 Cal. 498.

(25) [1906] 88 Cal. 899.

(26) [1905] 2 C. L. J. 158=10 O. W. N. 601.

(27) [1905] 2 O. L. J. 61.

(28) [1907] 29 All. 457=4 A. L. J. 455=(1907) A. W. N. 117.

(29) [1907] 29 All. 426=(1907) A. W. N. 115.

but distinguished that case on the ground that it recognized the right of appeal, as the plea was that there was no award in fact. In *Walji v. Ebbu* (30), Chief Justice Jenkins and Bachelor, J. followed the decision of the Privy Council in holding that on the ground of the misconduct of the arbitrators there was no appeal against the decree in accordance with award. But the learned Chief Justice distinguished the Bombay cases where an appeal was held to lie on the ground that "the award was illegal ab initio or, in other words where there was no award in law" see page. 290. The Chief Justice added: "Obviously if there is no award, there is no basis for a decree. (If this observation is right he would certainly seem to be in favour of engrafting an addition to the limitations contained in S. 522.) In this Court the decision in *Indur v. Kandadoi* (31), though it is open to the remark made in *Kanakku v. Nagalinga* (32) that no reference is made therein to the decision of the Privy

Council, is in favour of not confining the right of appeal to the cases dealt with in the last clause of S. 522. An appeal was entertained also in *Thiruvengadatha v. Vaidinatha* (33) though *Ghulam v. Muhamad* (7) was referred to. In this state of conflict of authority I think a reference to the Full Bench is necessary, as my own inclination, notwithstanding the apparent tenor of the decision in *Ghulam v. Muhamad* (7), is in favour of the view that the right of appeal is not confined to the two cases mentioned in the last paragraph of S. 522." Such an extensive quotation is but necessary, though not so much for bringing out the conflict in India about the Privy Council decision as for bringing out the points that are likely to be advanced to distinguish the Privy Council case from the Nagpur one especially when no better and exhaustive argument for the distinguishment on all sides can be found elsewhere. The quotation will also show the defects in the old Code which created difficulties to obviate which the words "or being otherwise invalid" in para. 15 (c) are added in the present Code.

(30) [1905] 29 Bom. 285=5 Bom. L. R. 132.

(31) [1903] 26 Mad. 47=12 M. L. J. 396.

(32) [1909] 32 Mad. 510=4 I. C. 871=19 M. L. J. 480.

(33) [1906] 29 Mad. 303.

(To be continued)

Reviews

A Manual of Law Terms and Phrases by Mr. K. Jagadisa Aiyar, *First Grade Pleader, Ponneri, Madras Presidency*, and published by Messrs. Eastern Law House, Calcutta. 1927 Edition—Over pp. 200, Price Rs. 5.

The first pages 217 out of the total number of 218 pages are devoted to the giving of meanings of words like "abandon," "abatment," "Abdication," "Abduction," etc. while seven pages are devoted to meanings of foreign legal words and phrases such as "a fortiori," "a priori," "ab initio," etc. Pages 224 to 234 deal with foreign legal maxims with their meanings. A list of abbreviations used in Law Reports and the list of

Indian Law Reports together with a supplement cover the remaining 14 pages. The printing and the get-up do credit to the publishers, viz., the Eastern Law House

The Provincial Insolvency Act V of 1920 as amended up to 1927— by Mr. A. Ghose, B. A., B. L., *Vakil, High Court, Calcutta* and published by Messrs. Eastern Law House, Calcutta. 1927, 6th Edition, revised and enlarged—Over pp. 400, Price Rs. 4.

The first edition of this book was published in 1920 and within the short period that has elapsed since, five editions have been exhausted and this sixth edition has maintained the high level

attained by the author in the earlier editions. One often misses relevant authorities of the highest importance, sometimes even Privy Council decisions, in commentaries that ought not to ignore such cases. But this book is free from that fault. This is not a mere ill arranged collection of cases, since the author has carefully utilized the material and sifted the principles. Relevant portions of the Civil Justice Committee's report on insolvency and Statement of Objects and Reasons and a fine introduction together with model petitions and pleadings and the rules of the several High Courts under the Act form an important feature of this book. The printing and get-up maintain the high standard of the Eastern Law House.

A Comparative Study of the Law of Insolvency in British India by Mr. D. B. Kshirsagar, B. A. LL. B., (554 Sadashiv Peth) Poona. 1927 Edition—Over pp. 250, Price Rs. 3.

This is the first work of its kind. A comparative study of the law of insolvency in British India with reference to the Presidency Towns and Provincial Insolvency Acts is likely to create uniformity in matters of law and procedure in presidency towns and in the mufassal. Though the principles of the English Bankruptcy Act are the basis for the Provincial and the Presidency Acts yet there are differences in the two Acts which ought not to be ignored. The insolvency law, as administered either in the presidency towns or in the mufassal, has, unfortunately, created in India the impression that a person can recklessly indulge in speculations regardless of commercial morality or financial stability. That certainly is not and should not be the object of the insolvency law. A deeper study therefore of the English Bank-

ruptcy Act is necessary both by the members of the Bench and Bar in order to see in what respects the Indian law differs so that it may be made uniform with the law prevalent in England where the law is more rigid and is positively more rigorously administered. This book, therefore, is most welcome as a first step towards that comparative study. The author has also in some places shown the differences between the English Bankruptcy law and the law prevalent in India. The printing of the parallel provisions of the Provincial and Presidency Insolvency Acts is extremely convenient.

The Madras Criminal Rules of Practice Revised and corrected up to September 1927 by Mr. K. Jagadisa Aiyar, Ponneri (Madras Presidency) and published by M. K. Srinivasa Iyengar, Law Publisher, Triplicane, Madras; Pages over 300, Price Rs. 3.

In view of many changes in, repeal of and addition to, the Rules of Practice, a publication like this was absolutely necessary, more so for the practitioners and Court officers in the mofussil and this edition will certainly remove the difficulty that must have been long felt. All the Rules are contained in Part I while Part II includes all the executive orders of the Government. The utility of the book has been enhanced by the addition of marginal notes and short explanations.

An Index also has been usefully added. Appendices containing all the Judicial and Administrative forms also have been incorporated. We hope that this publication will be useful not only to Madras Presy. legal practitioners but also to the profession as a whole in the comparative study of procedures of different High Courts. The get up and printing are excellent and do credit to the printer and publisher.

THE ALL INDIA REPORTER

JOURNAL SECTION

1927]

[DECEMBER

Articles A CRITICISM ON. 'LAW versus JUDICIAL DISCRETION.'

(*vide A. I. R. 1927 Journal 29.*)

BY S. N. NARAHARAYYA, B. A. LL. M., *Advocate, Bangalore City.*

(*Continued from A. I. R. 1927 Journal Page 68*)

Before entering into evidence the parties had to give security or furnish sureties to satisfy the decree or award, or the case would not go further. The ability to do so of a party was the test of the soundness of his cause or his character to bring one such, and in extreme cases when he was unable to do so a guard was placed on him too and he had to pay his wages. Should a party deny a claim he had to pay it on proof, and the losing party, a fine too, equal to the amount of claim, while a false plaintiff was mulcted out twice the amount he claimed. Actions were of two kinds, emergent and ordinary, and offences against person, theft, etc., fell under the first class. All emergent cases were immediately heard for the obvious reason that evidence might be lost or that justice not-timely might prove any thing but justice, while the ordinary ones where there was no such danger could wait till it was convenient to the Court as well as the parties. No Court-fee was required to be paid at the outset, but in money transactions the successful creditor had to pay 5 per cent. of the amount claimed and the losing debtor a fine of double that. In "enforcing" decrees the party unable to pay was made to do some work for the decree-holder, and if no suitable work could be devised for sufficient reasons, time was allowed him to pay as he earned,—often opportunities being thrown in his way to earn. There were also

rules of limitation, e.g., the accumulated interest could not exceed the principal, twenty years of open and unprevented enjoyment effected adverse possession in land, and so forth. Is it still true that "do as he (king) may please, he ran no risk of outstepping the boundary of his sphere"?

The learned writer continues: "It is deep-rooted but unfortunate notions that have always made judicial posts attractive and coveted in India, and though the circumstances have altogether changed since our coming in contact with the West the mentality still continues in spite of it. There you have a clear instance of different mentalities. In England judicial service is looked upon as a career of useful public service. In India it is looked upon as an opportunity for lording over our fellowmen". 'This is the most unkindest cut of all' Yes, 'distancelends enchantment to the view' but the familiar Hindi words *banda* and *bandagi* speak volumes as to the nature of Hindu mentality. Again, service itself in general was held in contempt in India and the smritis declare that "service is the life of dogs". Judicial service in particular held out more fear than was attractive inasmuch as the litigants' life, honour, and property depended upon the decision of the judge who could not be too learned, too discreet, and too careful. The judge though a sheer instrument of the state or the hand of the king did still feel his *personal* responsi-

bility in the matter and would cry *mea culpa* for any the slightest injustice. Speaking of the "rod" (*danda*)—which was so called *damanat*, because it quells, *adantan* the rebellious against *dharma* and order—it is said that misuse of it would destroy the king himself with all the people. It was a symbol of justice and the fear of any miscarriage of it held back even the capable from accepting the honour. That is our tradition and nevertheless should there be any "deep-rooted but unfortunate notions" it is because that the only service we have traditionally known of—though not salaried—is delegation of the king's authority and one would court the honour of wielding it. It is a sentiment not only Indian but English enough too and sung by an English poet that.

"To reign is worth ambition though in hell."

In the early days of British rule England excited a strange vision to the masses of India. It seemed a 'fairylane' inhabited by a people who could work 'wonders' and 'miracles' in the physical world and the rare Englishman with his strange dress and stranger manners, and his lady always by his side, was an object of wonder. The historical conditions made him (because he was not well seen), feared, obeyed, and admired. His ways and means formed a contrast with the Indian ones, his behaviour excited a sense of individuality, and his success in bringing India under his sway made him an object of veneration. With the practical disappearance of the old Kshatriya rule with the second battle of Thanesvar, people were groaning under invasions, anarchy, misrule, religious persecution, and what not. In response to a desire to revive or restore the old order of things Vijayanagar was a brilliant beginning and the rise of the Mahratta power a short-lived continuation. The first was actually destroyed after the battle of Talikote and the second, side by side with which the British power in India was gathering strength, was dealt a deathblow first at the third battle of Panipat and lost all hope of its supremacy with the treaty of Bassein. The English power was established and the ending of the Mutiny removed the remotest notions of its weakness. The prevailing order had gone and a change had come. Chivalry

was long dead and buried, personal valour grown feeble could not oppose the new gunpowder warfare, fighting classes of the old style for want of venue and vent to their powers and also of means of livelihood, became thugs and freebooters, and the people cowed down and meek welcomed peace at any cost. It is a psychological law that the ruling community is held in veneration, (especially in India where the king is held as containing a divine element in him) and what they do the people (especially those from whom vitality has fled) follow. The English manners and customs came to be imitated and he who knew English to communicate with the governing class was shown a veneration which was no whit short of that paid to a priest of god. The apathy of the olden days for paid service had lost its strength and the 'brain price' which the aliens brought and extended even to their agents and interlocutors excited a sense of elevation and importance in society. It ought to be this that made the posts under Government, including judicial ones, attractive or to be run after. All the same the old notion of delegated authority continued and public service newly introduced was mistaken for it. Everywhere new departments of administration grew up with their respective heads and staff in place of a few king's officers of the bygone days, and it is this, coupled with want of direct touch and intimacy between the governing class and the governed, and also the ignorance of the language of the former by the latter (with their obvious effect and opportunities), that gave an opportunity to many "of lording over our fellowmen." Nevertheless it was not in any bad sense but with an emulative sense of the Vedic benediction *samananam uttama sloko (a) stu* (may the best renown among thy equals come to thee). In England and America where public service had a different origin and a different history and is understood in the only sense familiar there and the best brains are usually occupied either in some profitable business or concern, or in the development of the resources of the state, judicial appointments, or for that matter any Government appointments, have no "special charm" (except to those who lack enterprise) because there is neither

the vanity of the sense of delegation of king's authority nor rich emoluments attached to them, and what is wanting in these respects the sense of renown (which is reserved only to a fortunate few) or the consciousness of public benefaction has to supply. E. g., English figures may be familiar we give the American figures which are more interesting and illustrative) the Chief Justice of the Supreme Court of America gets a salary of \$ 13000, per annum and his associate Judges \$ 12,500, each, and a District Judge \$ 6000. Taking a dollar as equivalent to Rs. 3 the salary of the Chief Justice comes to Rs. 3,250, of one of his associate Judges Rs. 3,125 and of a District Judge to Rs. 1,500 a month, which, considering the average earning of the people (Rs. 35 a year per capita in India; £ 50 a year per capita in England; and much more in America though the correct figure is not available) and the cost of living there, is a very unattractive sum. Many Americans cannot have their own homes and find it easier to live in hotels, and Justice Holmes humorously remarks. "We the Americans are cuckoos and make our homes in the nests of other birds." One can compare this with the Indian scales of pay and (taking the cost of living etc. in India) draw his own conclusions. In England the nobility and the well-to-do classes who need not work for bread take to "public service" as a sort of intellectual occupation, but, be the reason what it may, the Indian conditions are different and higher appointments are accepted not merely as an opportunity for "useful public service" but also as attracted by their emoluments. The learned writer is rather harsh to the subordinate judiciary in India, and whether, it is that he unfortunately came in contact with only the black sheep in that fold or has any particular reason to make the observations he does regarding them, it is none the present purpose to discuss.

Next, he says speaking of law as that "these rules are binding on the sovereign and the subject." Apart from the fact that our languages know no old terms expressive of that relation (we have only '*raja*' the shining personality, and '*praja*', the populace that spring from the land) it could only be said that it is so on the sovereign to the extent of enforcing and

on the subject to the extent of being enforced upon. If the King of England would tomorrow shoot a person dead one wonders if a Judge Goscoine would come forth to order his arrest or sentence him for murder. The explanation offered may be valid, but the question is, does it establish the equality of all, the sovereign included, as our learned writer asserts.

Now to "the conscience of the public" as reflected in the law. Mr. Bryce writes: "Europeans have thought of a legislature as belonging to the governing class. In America there is no such class. Europeans think that the legislature ought to consist of the best men in the country, the Americans that it should be a fair average sample of the country. Europeans think that it ought to lead the nation, Americans that it ought to follow the nation." If the "governing class" consisting of "the best men in the country" able "to lead the nation" is all the public then truly our learned writer is right: but as it is, those that for the time being conduct the Government in England force all sorts of measures on the people; they enjoy the confidence of the House; and there is a thorough organization and "whips" at their back. The time of the house is all occupied in considering the Government measures and there is little or no time left for private Bills. The M. P.'s are not responsible to their constituents for any act of theirs and can do what is not contemplated by or is even repugnant to the people who elected them. Nevertheless that is the way in which the law originates and it is straining language to call it a declaration of people's will. It is not "the conscience of the public" unless "the governing class," whether it turns out repugnant or contrary to the people's desire, is itself the public conscience. That would be a strange definition of "conscience" and here are two, cited by Webster: "*As science means knowledge so, conscience etymologically means self-knowledge* But the English word implies a moral standard of action in the mind as well as a consciousness of our own actions. . . *Conscience is the reason employed about questions, of right and wrong, and accompanied with the sentiments of approbation and condemnation*" (Whewell). "*Conscience* supposes the existence of some such [i.e.

moral] faculty and properly signifies our consciousness of having acted agreeably or contrary to its directions" (*Adam Smith*). Let language be strained and said that the "conscience of the public" ends with the election polls (even that is not satisfactory; votes are canvassed or even swayed away by election campaigns) and thenceforward it is the conscience of the "governing class," but is it so to that extent at least in India? The history of the Indian legislature (central and provincial) ever since its inception speaks for itself how much "the public conscience is reflected" in the several "Codes" and "Acts" we have, but yet our learned writer calls it "something unique in the history of its (India's) people."

Our learned writer advocates the "substitution of the machinery of law for human judge" and it is one thing to do it to that extent of preventing a judge to do this or that in the supposed name of "equity, justice, and good conscience." He speaks of the elimination of the "personal element" but it cannot be disputed that the present law, statute or precedent, has in its very inception a personal element and another in its administration. The difficulty is such that for that very reason legislation was not attempted in India though its seeds were not altogether unknown. "Legislation," says Mr. Bryce, "is a difficult business in all free countries, and perhaps more difficult the more free the country is (so was India) as has been pointed out at some length above) because the discordant voices are more numerous and less under control." He also says: "In Europe all sorts of persons are sucked into the vortex of legislature—nobles and landowners, lawyers, physicians, businessmen, artisans, journalists, men of learning, men of science. In America five representatives out of six are politicians pure and simple, members of a class well defined as any one of the above-mentioned European class." It could be said that the legislation in the making of which "all sorts of persons" have joined must be of an ideal kind and agreeable to all classes of persons and satisfactory from all points of view, but the question is, to what extent (other than voting) they are responsible to the making of it and whether there is such a thing as "legal acumen" in the making and handling of law,

and whether "all sorts of persons" can have pretensions to it. For our part we are sceptic that it is either not required or could be easily acquired and we do believe that it is a special faculty and can only be the result of direct study, training, application, and experience. The net result is, a few frame law and the rest are all voters at the persuasion of others or in loyalty to their leaders. This and other things must have been realized in India and a new way altogether free from such difficulty could therefore have been devised. One verse of *Manu* most pithily expresses the characteristics of Dharma (of which "law" is a branch) and "legislators:" "Listen to that Dharma which is (always) practised by the learned that are good and always free from a sense of instinctive likes and dislikes and is permitted by conscience," and the denotations and connotations of all the words employed have to be taken and considered before the sum-total of the conceptions of "law" and "legislators" could be determined. The origin of the *Smritis* shows that when new complications arose in society and the necessity was felt to solve the question of Dharma applicable to them a person of eminence (who could be said to have formed a single man legislature) who could keep the eternal principles (corresponding to the principles of legislation of the present day plus the principles of "law" too) in view and declare the "law" to meet the new conditions was requested to promulgate the "laws" and what he said was loyally accepted and obeyed by all. The difference is that, under popular and constitutional governments, people's representatives, formally chosen, constitute the legislature and a section (Committee) of it formulates the law for the acceptance of the whole House of Representatives; but it was the elite then of the people (who would be obeyed, and who 'elected' in the sense that the elected person would be followed though not in the sense of chosen as at the present day) who had assembled in a particular place from all parts of the country selected a promulgator (who corresponds, though alone, to the Committee) for declaring the "laws." Let it not be supposed that he was an undisturbed lecturer and those who chose him silent audience, but he was hackled by them with all sorts of questions till a satisfactory answer

came, and the promulgations were so to speak discourses containing numerous questions and answers. That was for the whole country and on a large scale, and in smaller and individual matters there were *parshats* or referees, but all the same the fact of implied representation and actual promulgation was there though not in identically the same manner as at present in the West. At any rate it was not much behind the "public conscience" discussed above. But it was kept within its legitimate limits for the reason that it could overstep the eternal principles otherwise, bring forth loose and short-lived law in place of sound and enduring "law," and produce chaos in place of order. Even if, for the sake of argument, they could be made better, there could have been people even in those days who found consolation in that "certainty is better than exactitude." Some lesser *Smritis* did actually come into being, but for the reason that the old ideal of promulgating "laws" had degenerated they have all been thrown into the background by eminent authorities themselves. Also "the greatest good to the greatest number" was not an unknown principle and it is clearly stated that "in the interests of a family one can be overlooked, a family in the interests of a village (or township), a village (or township) in the interests of a country, and the world in the interests of one's own self (*Atmarthe*)" (—the last probably meaning, one might overlook the whole world in self-defence). Such notions could be brought under *Arthasastra* which in many respects is the same as utility, but in commenting upon "Let a king attend to judicial trials according to *Dharmasastra*" *Vijnavesvara* says "according to *Dharmasastra* and not according to *Arthasastra*, for the former contemplates pure justice and the latter utilitarian justice.

Regarding "bringing private opinions" it is hard to draw a line between a "private opinion" and a not-private opinion. The written law is there and it is no private opinion if it is capable of being understood in one way by one and in another by another. The difficulty is enhanced by the fact that the case-law has to be applied and one says that a case is in point and another it is not—both honest men, learned and honour-

able. Judges often give conflicting opinions and sometimes (as in the *Franconia* case) the minority may be in the right, but yet the view of the majority prevails, and nevertheless the view of either is not private. It may be that one exercises his private opinion without knowing he is doing so or honestly believing that he is exercising no private opinion at all, and if that is so reasons beyond human control are responsible for it and men's sense of good and bad depends upon the nature of life they have led and the experience they have derived. Proud is the day when man can divest himself of the personal element in feeling and thinking at least so long as the present state of things continues to last.

"There is no promise to sell or lend his conscience to the client" on the part of the counsel. Here there could be two views, one of the lay public and the other of those who know the nature and working of law whether professional lawyers or others. The question comes here whether the law is technical or not, and whether it is in consonance with the nature and technicalities of law that a lawyer has to guide himself or by the opinion of the laymen as to the nature of an act or transaction. *Courvoisier's* case is a splendid illustration of the conflict between legal and popular point of view. During trial *Courvoisier* admitted his guilt (murder of Lord William Russel) to his advocate Phillips, and nevertheless Phillips in consultation with an eminent judge who sat on the Bench with the trial judge had to continue the defence of the prisoner. In a speech which was a master-piece of eloquence he diverted his energy to impugning witnesses' veracity claiming it was not his business to say who committed the murder. "That conduct of Phillips has since been justified by the preponderance of professional opinion though public sentiment outside the profession generally condemned it" (*Hailman*). Our learned writer admits that if that be a fault let it be of law and not of the judge and should he not extend the same courtesy to lawyers also? Does he expect that lawyers should argue their cases from a point of moral or ethical principles, and even if they would, would the Court accept them in the face of the law properly so called? Theirs is a diffi-

cult task especially as no point of law is quite certain and both sides have to be represented in the light of the instructions received from the parties. Laymen are not lawyers and to them any and every evidence can be tendered at any and every stage in any and every manner but a lawyer has to present his evidence in an orderly, relevant, and technical manner and for that purpose he has to direct the witnesses to depose in a particular manner. It is straining language to say it is coaching, and in fact American writers of repute advise lawyers to themselves examine the witnesses first as part of studying the case. Even in the Court room lawyers have to lead witnesses to particular points and make them state what they have to say in respect of it, and when enough has been said regarding it to lead them to another point and so on. That is not done to prevent the witnesses from expressing themselves freely for the lawyer fears that it would damage the case, but to prevent flippancy and levity on the part of the witnesses on one side and on the other to give an orderly manner required by law to what they have to say. The client watches them, the opposite side watches them, the Court watches them, and the public watch them too. It is a cheap expression that lawyers are liars, but that is the layman's view and a tribute an acquitted Courvoisier would give to his Phillips too. But just as our learned writer advises judges that "they should get the whole work performable by the machinery (of law) performed by it instead of stealthily adding anything of their own manufacture" lawyers too have the same machinery to set in motion and cannot put forth "their own hand" to "manufacture." If such law is mischievous in the eye of the people (who have access to lawyers and therefore could speak this or that of them and not of judges to whom they have no access), well, that is "their own make" and they can see that the whole of it is replaced by morality and equitable justice. There is excuse that the ignorant speak so and so of lawyers but it is unjustified that those who pre-

tend to know law and the working of it should cast aspersions at and speak disparagingly of the learned members of the honourable profession.

Lastly regarding "private or moral conviction" and "judicial conviction:" It is strange that our learned writer is at pains in this matter when not only those but also "legal logic" and "ordinary logic," "legal guilt" and "moral guilt," "legal, conscience" and "moral conscience" etc., there exist in all reality. It is not necessary to discuss them all here, but for the purposes of illustration "legal guilt" and "moral guilt" may be distinguished. Says a learned writer: "Legal guilt and moral guilt are not the same thing. Moral guilt is a subjective, personal, ethical matter; legal guilt an objective, social, legal matter. The first exists by virtue of a man being a free, responsible agent, in the larger, ideal, ethical sphere; the second by virtue of being a socially restricted animal in a political sphere. No contradiction exists, then, to find a man morally guilty of a crime and yet legally innocent, for with law it is all a question of proof. Moral guilt is a question of what the man has done; legal guilt of what the law has proved him to have done. Conversely, through the imperfection of the system and the lack of human omniscience, a person may be legally condemned yet morally innocent." (*Brumbaugh*). The same writer says: "(There is) a double standard—that of moral law in the perfect ideal cherished with more or less enthusiasm in the public mind, and that of legal law temporarily fixed, and as far as possible an expression of the former embodied in the statutes and customs of the country. That the two are not identical is to the unreflecting a demoralizing weakness of the law and often *unjustly attributed to the callousness of the legal profession*" (the italics are ours). So with the rest and comments are needless.

This in brief closes the examination we proposed to ourselves and it is hoped that the answers to the points not covered by this do similarly become plain.

Notes and Comments

Husainbhai v. Bhansilal: *A. I. R.* 1924 Nagpur 338

By M. G. SHIRSALKER, *Pleader, AKOLA*

(Continued from *A. I. R.* 1927 Journal Page 79.)

12. Under the present Code also, in spite of the attempt of the legislature to meet the difficulties felt under the old Code in carrying out the policy of finality in cases of arbitration the same old conflict has begun to show itself, *Girija v. Kanai* (34), *T. Wang v. Sona* (8), and the present Nagpur case, though these do not specifically refer to the Privy Council decision, show by their actual decision that they are in favour of distinguishing the same. The question of the maintenance of a suit to set aside a decree passed in terms of the award being allied to that of the maintainability of appeal, the decisions in *D. Vijaya v. Venkatsubbarao* (14) and *Subarao v. Appadurai*, *A. I. R.* 1925 Mad. 621, in favour of the maintainability, must also be considered as throwing their weight in favour of the above referred cases. In fact Tyabji J. in *Vijaya v. Venkata* (14) specifically says:

"The two decisions in *Raja Narain v. Choudharain* (15), and *Ghulam v. Muhammad* (7) can be partially reconciled if *Ghulam v. Muhammad* (7) is taken as deciding that the matter on which the decision of the Court making the reference is final (provided it upholds the award) must be connected with the proceedings before the arbitrator." Whereas *Lutawana v. Lachya* (19), *Bacha v. Abdul* (3), *Hari v. Ram* (35), *Muhamad v. Valli* (36), *Sagar-mull v. Hira* *A. I. R.* 1926 Pat. 164 after specifically referring to the Privy Council decision, hold that it is still a binding authority. Under these circum-

stances when eminent Judges differ as to the real import of the Privy Council decision, it would be hazardous to support any particular view. However, attempts to solve the difficulty need not be stopped, and suggestions for further consideration should always be welcome. It is, therefore, with due humility and deference that I proposed to offer some suggestions.

"13. In the first place, it is necessary to see whether the alterations that are to be found in the present Code are such as to affect the policy of finality which has been found in the former Code by the Privy Council. It is significant to note in this connexion, that in all those cases, which are to be supposed to favour the distinguishment of the Privy Council case, no such contention about the change in law or of policy in it is advanced. Besides, the holders of contrary view are unanimous in holding that there is not only no change but that the alterations found in the present Code, viz. the addition of the words "or otherwise invalid," have actually strengthened the old policy of finality: vide the remarks of White, C. J., in *Bacha v. Abdul* (3). Even Walsh, J., who according to Sulaiman J., is in favour of the limited construction of the words "or otherwise invalid" observes in *Kanhayalal's* case (13): "Since the case of *Ghulam* was decided the words "or otherwise being invalid" have been added without in any way affecting the decision or the reasons given by their Lordships of the Privy Council." A mere comparison of the old S. 522 and the present paras. 15 and 16 will show that this view of Walsh, J., is correct. In this way the Privy Council decision and, in fact, all decisions

(34) [1918] 27 O. L. J. 339=13 I. C. 169.

(35) *A. I. R.* 1923 All 502=15 All. 441.

(36) *A. I. R.* 1924 Bom. 321.

since then till the new Code, cannot be distinguished on the ground of the change of law.

Now turning to the cases themselves, that is the Privy Council and Nagpur cases and the law-points involved therein: it is evident that in both, the same question, viz. whether an appeal lay under para. 16 (2) was before the Court for determination. But that does not seem to be enough. For there are more grounds than one, on which it can be contended that the appeal lay or did not lie. So the materiality lies in the grounds urged in the two cases. The ground in the Nagpur case is that the reference is invalid. The particular circumstance under which the reference is invalid is evidently not so much material, for the ultimate deprivation of the Court's power to take action under para. 16 arises from the invalidity and not from the particular circumstance or fact creating the invalidity. Para. 1, which provides the law on the point, mentions the conditions for a reference to be valid. Some of these are: (1) the matter in difference should be one in suit and not in execution. *T. Wang v. Sona* (8); (2) all parties interested must agree, as held in the case under notice; (3) this agreement must be (a) legal and lawful, i. e. in the case of a minor party, it must be sanctioned by the Court under O. 32, R. 7; *D. Vijaya v. Venkatsubbarao* (14); (4) the matters to be referred should be fit for reference, *Ganoba v. Narayan A. I.R.* 1923 Nag. 112, (5); the difference between the parties should be real. So the difference in facts creating the invalidity is not at all material. That is why *T. Wang v. Sona* (8), where the reference was invalid because the subject-matter in dispute, being a dispute in execution of a decree was not fit for reference, is as much a good authority as the Nagpur case, where the reference was invalid because the plaintiff did not join in the reference, for the proposition that where the reference is invalid, appeal lies. However, even the actual invalidity itself is not material, when the decision is that no appeal lies. For to arrive at a decision that no appeal lies, it is not necessary to go into the question of this invalidity. For example, if in the Nagpur case, one has to hold that the appeal did not lie, where is the need to determine whether the reference is valid

or not? The reason is that here we are dealing with the powers of the appellate Court and not of the trial Court. The question of deciding whether an appeal lies will always appear before an appeal Court in cases of arbitration, and, as such, it has nothing to do with the soundness or otherwise of the grounds urged before it against the decision of the trial Court if the appeal Court has to hold that no appeal lies. Owing to this peculiarity, the ordinarily required similarity of facts in order to make a decision binding in another case, is not necessary, where the decision sought to be authoritative, is that the appeal does not lie, under para. 16 (2).

14. Applying these tests to the facts of the Privy Council case it will be seen that there one of the defendants in the suit through his guardian ad litem agreed to refer the case to arbitration without the sanction of the Court under O. 32, R. 7. The Court also without noticing this defect referred the case to the arbitrators who in due course gave their award. Although the defendants objected to the same on the ground of this want of sanction, still the Court, evidently holding that the agreement did not require such sanction and that the reference consequently is valid, passed a decree in terms of the award. Defendants appealed to the Chief Court of the Punjab, which, instead of going into the question whether the reference was invalid for want of the Court's sanction under O. 32, R. 7 to the agreement of reference, evidently assumed the invalidity as it was entitled to do, if it had to hold that the appeal did not lie, and held, after entering exhaustively into the whole history of the law on the subject from 1859, specifically that no appeal lay. In further appeal to the Privy Council, Sir William Rattigan, K. C., for the appellant, specifically pleaded, that the reference was invalid for the reason mentioned above, but still their Lordships, in view of the clear words of para. 16 (2), expressed their entire concurrence with the decision of the Chief Court. Thus it is clear that there had been specific plea all along from the trial Court till the Privy Council that the reference was invalid and the decision of the two appellate Courts is that no appeal lay. In this way the conditions detailed above for the deci-

sion being authoritative in cases where the reference is invalid being satisfied, there is hardly room for distinguishing the case and the remark of Krishnaswamy Aiyar, J., that the case before the Privy Council was not a case of no submission,—a remark, the value of which is much weakened by his own holding later on as one of the members of the Full Bench that the said decision is binding on him in the case before him—does not seem to be correct, for it is not necessary for the decision of the Privy Council to be binding that the case before their Lordships should be actually one of no submission, but it is quite sufficient that such a contention had been raised. Similarly the remark of Kinkhede, A. J. C., in respect of *Lutawana v. Lachya* (19), a case similar to the Privy Council case, that the parties interested had joined—a remark evidently meant to convey the same idea as is done by the remark of Krishnaswamy Aiyar J.—must share the same fate. It may be stated here that the weight of opinion on the point whether an agreement to refer under para. 1 is subject to O. 32, R. 7 is in favour of holding that it is so subject: see *D. Vijaya v. Venkatasubbarao* (14), *Atmaram v. Bhila* (37), *Ganesh v. Mulchand* (38), *Chajju Mal v. Tarloki A. I. R. 1926 Lah. 665*, *Emnabai v. Fakir A. I. R. 1922 Sind 1*.

The contrary view is propounded only in *Hardeo v. Gauri* (39), though towards which two of the three Judges in *Lutawana v. Lachya* (19), and the Judges in *Debir v. Amina A. I. R. 1925 Cal. 475*, are inclined favourably without actually deciding the point. Krishnaswamy Aiyar, J. and Tyabji, J., both find it difficult to reconcile this Privy Council decision with their Lordships' prior decision in *Raja Narain v. Choudharain* (15), but this difficulty is not unsurmountable under the present Code, for the case of an award given beyond time allowed by the Court was specifically declared invalid under the last clause of S. 521 of the old Code without its being included in S. 521 (c) as one of the grounds for setting aside the award, but under the present Code, there is not only no such

specific declaration—which, by the bye, does not alter the nature of the award as held in *Shib Kristo Dawn Co. v. Satish Chandra* (40)—but that the clause itself has been transferred to and amalgamated in para. 15 (c) so that it cannot now be contended that a decision of this objection is not final, which it would have been possible to contend under the old Code, the case not being included in S. 521 (c). Thus, owing to the change in law, *Raja Narain v. Choudharain* (15) is no longer an authority and so it cannot conflict with *Ghulam v. Muhamad* (7). In this way it is submitted with due deference that the authority of this Privy Council decision is quite intact under the present Code and it cannot be distinguished from the cases where the references are invalid as is in the Nagpur case.

THE DISTINGUISHMENT OF LUTAWANA
v. LACHYA (19), AND BACHA SAHEB
v. ABDUL (3).

15. The learned Judge in the Nagpur case has tried to distinguish the above two cases obviously to show that there is no conflict with his view in other Courts. The facts of the Allahabad case are quite similar to those in the Privy Council case of *Ghulam v. Muhamad* (7), differing however; in one somewhat important particular, viz., that in the Allahabad case the objection of the invalidity of the reference was not taken in the trial Court though other objections were so taken and from the limitation point of view it may be argued that some importance is attached to this difference. The argument about this difference cannot be made much of. In the first place, the objection in the Allahabad case being that the reference is invalid for want of sanction under O. 32, R. 7, it is clearly based on a breach of a statutory provision affecting the jurisdiction of the Court, and it is clearly the duty of the Court to take judicial notice of the same notwithstanding the law of limitation, as held by Lord Morris in *Raja Narain v. Choudharain* (15) and in *Girija v. Kanai* (34). Besides it has been already shown, while discussing the authority of *Ghulam v. Muhamad* (7), that in the appeal Court, where it has to hold that the appeal does not lie, the question is not whether the objection

(37) [1913] 15 Bom. L. R. 223=19 I. C. 424.

(38) [1912] 95 P. R. 1912=15 I. C. 161=159 P. W. R. 1912 (F. B.).

(39) [1906] 23 All. 35=2 A. L. J. 493=(1906) A. W. N. 171.

(40) [1912] 39 Cal. 822=18 I. C. 69.

raised is a good ground of appeal on merits or from the limitation point of view but is, whether, assuming the ground to be good, the appeal lies. Of course the position is different if the Court has to hold that the appeal lies. In this view obviously the fact that in the Allahabad case the objection to the validity of the award was first raised in the appeal Court, that is, when it was time barred is immaterial for the purpose of distinguishing that case. To dispose of the appeal on this ground, viz., that the ground taken is time barred, is to dispose of it on merits and on the basis that the appeal lies and not on the second ground mentioned by Richards, C. J., arising under para. 16 (2) in his judgment, a relevant portion of which is quoted below. So what is necessary to see in respect of the Allahabad case for the purposes of distinguishment is whether the learned Judges did decide the appeal on the ground that appeal to the District Judge did not lie or on the merits, they being entitled to take any one of these two positions under the peculiar circumstances of the law and facts. What Kinkhede, A. J. C., observes in respect of this case is:

(i) In that case all parties interested had joined.

(ii) In second appeal to High Court (from the remand order of the first appeal Court where the Court accepting the objection to the validity of the reference, remanded the case for trial on merits) the Judges observed that in the case before them, the defendants took no objection before the Court of the first instance on the ground that the award was invalid because the agreement to refer the dispute to arbitration had not received the sanction of the Court. It is observed that such objection could have been taken before the expiry of the period of limitation and not having been taken at that stage, it could not, at any subsequent stage, be put forward as a ground for setting aside the award. The objection was, therefore, disallowed on the ground of delay in making and not on the ground that it was not a valid objection. The necessary consequence was that the appeal to the District Judge was held incompetent and the order of remand was, therefore, set aside.

So far as the first observation is concerned, it has already been discussed in

para. 14 above and shown to be not beyond objection. In the second observation Kinkhede, A. J. C., holds that the Allahabad case was decided on the ground that the objection was time barred. In the face of *Raja Narayan v. Choudhurni* (15) and 27 C. L. J. 339, it is not probable that the Judges would hold this ground tenable, for that would be manifestly a wrong decision. However, apart from this, the question, as already stated, is whether the Judges decided specifically that the appeal before the District Judge was not maintainable under para. 16 (2) or not. If the question can be answered in the affirmative, then it is clear that the Allahabad case cannot be distinguished. The reply solely depends upon what the Judges have actually said in the judgments.

The Full Bench consisted of three Judges of whom Ryves, J., has written a very short judgment, probably because he wanted to do nothing more than to express his agreement with the judgment of the learned Chief Justice. Kinkhede, A. J. C., has extracted the observation only from the judgment of Banerji, J., and not from the judgments of the other two members of the Bench. In order to see on what points the learned Judges wanted to decide the appeal, it is necessary to see what points are stated in the judgments themselves to have been before the Court for decision, and to see how they are disposed of. The judgment of Richards, C. J., is very explicit in this respect. He says: "It is contended on behalf of the appellants first, that the matter in dispute, which could be referred to arbitration is not an agreement within the meaning of O. 32, R. 7, Civil P. C., requiring the leave of the Court. It is further argued that even if such an agreement was an agreement within the meaning of O. 32, R. 7, the fact that leave was not obtained did not give a right of appeal. It was a matter which the Court which made the order of reference could have considered, if it had been properly brought before it as being a ground on which the award was "otherwise invalid." After stating the points for determination before him in this way, the learned Justice decides them as follows: "While I am inclined to agree with the decision of this Court in the case of *Hardeo v. Gauri*, 28 All. 35, I do not think

that it is necessary in the present case to decide the point, because I think that the appellants are entitled to succeed on the second ground." Between this concluding part of the judgment, and the statement of the points for determination there is a long examination of the provisions of para. 15, 16 and 1. There is also a reference to the Privy Council decision in *Girija v. Kanai* (31). It is also said in the final part that "it seems to me that it was the clear intention of the legislature by this amendment of the Code that objections to the award on the ground of invalidity from any cause whatever should be decided by that Court (i. e. the trial Court) and no other Court.

This is another way of expressing that the decision of the trial Court on the objection is final and no appeal lies therefrom. So it is clear that Richards, C. J., specifically decides the appeal before him on the ground that the appeal before the District Judge is not maintainable under para. 16 (2), and not, as suggested by Kinkhede, A.J.C., on the ground that the objection is time barred. As regards the judgment of Banerji, J., the extracts from his judgment given by Kinkhede, A. J. C., no doubt support the suggested theory, but if it is taken with the context, or rather the previous portion of his judgment, it will be seen that Banerji, J. also meant to decide the case on the second ground urged by the appellant, and not on the limitation point. He begins his judgment as follows: "The first question to be determined in this appeal is whether an appeal lay to the Court below from the decree passed by the Court of the first instance." This clearly shows that that learned Judge wants to decide whether the appeal to the District Judge lay and not whether his remand order is correct. Had he really wanted to decide the appeal before him on that ground, there was nothing to prevent him from so stating. After stating the point for determination in the above way, he enters upon the survey of the history of the law under the old Code, and pointing out the alterations that appear in the present Code, he observes: "Under the old Code objection could not be taken on the ground that the award was invalid for any reason other than the reasons mentioned in S. 521 of that

Code. But, as pointed out above, an additional reason has been added in the present Code for objecting to the award that it is "otherwise invalid." If upon such objection being taken the Court judicially considers the objection and decides it in favour of the award and passes judgment in accordance with the award, the decree which follows such judgment is under the present Code final and no appeal lies from it." Such a discussion and conclusion about the interpretation of para. 15 was quite unnecessary had the Judge really intended to decide the appeal before him on the ground that the appeal before the District Judge was wrongly decided by him, that is, he wrongly allowed a time-barred objection to be taken before him. Banerji, J., finally concludes by saying: "I agree with the learned Chief Justice in holding that no appeal lay to the Court below." Thus it is clear that both this and the judgment of Richards, C. J. meant to decide the maintainability of appeal before the District Judge under para. 16 (2). Had the Judges intended to hold that the District Judge was wrong in accepting a time-barred ground, the final order of the Full Bench in the appeal against the remand order, would have been: "We, therefore, set aside the remand order and send back the appeal to the District Judge for disposal" or: "We set aside the order of remand appealed against, and in view of the fact that the effect of our sending back the appeal is its dismissal by the District Judge, we ourselves dismiss the appeal before him and restore the decree of the trial Court." Certainly it would not have been in the form it is found in at present in the judgments. Thus it is clear that that it is difficult to support the construction placed by Kinkhede, A. J. C., on the decision of the above Full Bench.

As regards the distinguishment of the Madras case, the facts of the case are: An application to set aside the award was made when the same was time barred. However, this fact about the application being time barred escaped the notice both of the parties and the Court, which rejected the same on the merits. In appeal to the High Court, a preliminary objection was taken that no appeal lay on the ground that the award was no award. White, C. J., with whom Tyabji, J. agreed says: "It seems to me

that on the authority of the Full Bench decision in *Suryanarayanrao v. Sarabhaih* (6), the preliminary objection is good and should be upheld." In giving reasons for this view, he says that the authority of the above Full Bench is still binding upon him under the present Code. In the end he holds: "In the present case the judgment pronounced under para. 16 (1) is, therefore, final under para. 16 (2)." In respect of this decision Kinkhede, A.J.C., observes: "There was thus no application in time which could be said to have been refused after hearing objections raised." This is, unlike the remark about the Allahabad decision, more an attempt to distinguish the case than to interpret the decision as to what it decided. However, the remark in question does not appear to be very clear. If the emphasis in it be on the refusal, and if it is meant to convey that in the Madras case there is no judicial refusal as required by para. 16(1), then, although it is true that para. 16(1), requires a judicial refusal, it is not so correct to say that in the Madras case the refusal was not judicial because the application itself was time barred. The reason is, that if a Court has jurisdiction to decide wrongly, it equally has a jurisdiction to fail to notice a particular fact. In this particular case there would have been no difference in the result had the Court noticed the fact that the application to set aside was time barred.

The Court thus being quite within its jurisdiction, it cannot be said that the refusal was not judicial. So this theory of non-judicial refusal existing in the Madras case, which seems to have been in the mind of Kinkhede, A. J. C., is also apparent from his immediately subsequent remark: "What is therefore needed to bar an appeal is a refusal of the objection after judicial determination by the Court," cannot be correct. If, however, the learned Judge, under his first remark, meant to say that the application in the Madras case not being in time, it is a case of no application and it is not a case of the refusal of the application, as is the case in Nagpur, that is still more indefensible. Can a plaint filed beyond the time fixed by the law of limitation be held to be no plaint at all? There is

neither reason nor authority for the suggested addition of the words "in time" after the word "application" in para. 16 (1). His third remark is: "the invalidity of the reference was not there (i. e., in the Madras case) challenged, as in this case, on the ground that all the parties interested had not joined in it." The report of the Madras case merely says that what is contended is that the award is invalid. It does not give the details and so there are no means for testing the correctness of the remark. However, if it be considered that the burden of showing that the Madras case is of an invalid reference is on the person who contends that it is an authority on that point, then no doubt, for want of any details in the report, the burden cannot be discharged. However, if, as contended elsewhere, it be correct that the present Code makes no distinction between the several grounds causing the invalidity of the award, then surely a decision in a case, where the dispute raised is about the invalidity of the award apart from the invalidity of the reference, will be quite a good authority about the interpretation of para. 16 (2) in the case where the dispute is whether the reference is invalid in addition. Even under the old Code, as held by Krishnaswamy Aiyar, J., in *Surya Narayanarao v. Sarabhaih* (6), no such distinction between the several grounds of the invalidity of the award could be made. Thus it is clear that the attempt made by Kinkhede, A. J. C., to distinguish the case in Madras on the ground that it is more a case of "no application" under the middle clause of para. 16(1) than a case of "refusal" under the third clause, as also the attempt to show that the case being one of "no award" is not binding, must fail.

THE PRESENT JUDICIAL OPINION.

The discussion, that has gone by, has shown that the Nagpur view finds ample support in Calcutta: see *Girija v. Kanai* (34), *T. Wang v. Sona* (8), *Har Prasanna v. Arab*, A. I. R. 1924 Cal. 353 (1). In Nagpur itself, *Ganoba v. Narayan*, A. I. R. 1923 Nag. 112, would seem to favour Kinkhede, A. J. C.'s view though it is open to the objection that there no objection about the maintainability of appeal was raised and decided. In all other Courts either there is no decision

on the point, or the view is contrary to the Nagpur one. *Lutawana v. Lachaya* (19), *Shanker v. Rampiari* (35), *Muhamad v. Valli* (36), *Sagarmull v. Hira*, A. I. R. 1926 Pat. 164, *Bacha Sahib v. Abdul* (3). In all these Courts there is no case holding that an appeal lay on the ground of the invalidity of the reference. No doubt *D. Vijaya v. Venkatasubbarao* (14) strikes a different note, so far as Madras is concerned, by holding that a suit will lie to set aside a decree on the ground that the reference is invalid because the agreement of reference did not receive the sanction of the Court under O. 32, R. 7. But that does not seem to have been followed since in that Court in any other case. In Nagpur itself, the later observations of Kinkhede, A. J. C., in *Shanker v. Chunnilal* A. I. R. 1926 Nag. 37, are, as shown elsewhere, not quite consistent with his view in the case under notice. Thus it is clear that the weight of authority is against the Nagpur view. It is remarkable in this connexion that there is a series of decisions in almost all Courts holding that a revision would lie on the ground that the reference is invalid. *Ravibhai v. Dayabhai* (41), *Bhikalal v. Achratlal* (42), *Gopal v. Baijanath* (11), *Parasuram v. Muthu* (43) *Azizuddin v. Moti*, A. I. R. 1926 Lah. 563. Looking to the fact that the High Courts generally do not interfere in revision these decisions may be said indirectly to support the majority view.

INTENTION AND PREVIOUS HISTORY OF THE LAW.

Although, as already stated, in the face of clear words of para. 16, there is no scope for interpretation, still, when inferential assumptions and presumptions are made in the Calcutta and Allahabad cases in the matter of the interpretation of para. 15, and especially when the rule of ejusdem generis is put forward in the construction of "otherwise invalid," it would not be wrong to refer to the report of the special committee which is responsible for the frame of the present Code and to the previous history of the law. Such references to the previous history have often been made by the

Courts, to find out the scope and object of the law: see *Umatul v. Nauji* (44), *Rustom v. Emperor* (45). Besides, as held by the Privy Council in *Vasudeo v. Srinivas* (46), the ordinary presumption is that the legislature, when it repeats in substance in a later Act an earlier enactment, intends the words to mean what they meant before. The report of the special committee says: "In regard to appeal some change has been made. Upon this question, adopting the view of the Judicial Committee as expressed in *Ghulam's* case (7), we are strongly in favour of finality in cases of arbitration. If right of appeal be given, the disappointed party will take advantage of every such right. To meet the difficulty expressed in the case reported in *Kaliprosanna v. Rajani* (16) (which followed many other cases in the Calcutta High Court) we have inserted the words, "or otherwise being invalid" in sub-S. (c) of S. 521 of the present Code. If therefore either party considers the award as invalid on any ground, he can apply only, to have it set aside. The last sentence in this report leaves no doubt that the legislature which accepted para. 16 as framed by the committee, without accepting its recommendation to make the order setting aside or refusing to set aside appealable as an order, did intend to accept the principle of finality and to keep open only one remedy, viz. that of applying to the trial Court for setting aside the award: see Gazette of India, Part 1, page 183, and S. 104.

As regards the previous history and state of law, the judgment of the Full Bench of the Punjab Chief Court reported in *Ghulam v. Mohamed* (7) fully shows that even under the old Code, in spite of its defects, the words were clear in supporting the principle of finality. So also the judgment of the Full Bench in *Surya Narayanarao v. Sarabhailh* (6) does the same. It has been already shown that, so far as the point under discussion is concerned, there is no change in the wording of the law. In fact the very words are reproduced. So it is clear

(41) A. I. R. 1921 Bom. 82=45 Bom. 882.
(42) A. I. R. 1925 Bom. 341=49 Bom. 535.
(43) A. I. R. 1925 Mad. 1209.

(44) [1907] 6 C. L. J. 427=11 C. W. N. 705.

(45) [1910] 7 A. L. J. 468=6 I. C. 101=11 Cr. L. J. 235.

(46) [1907] 30 Mad. 426=34 I. A. 186=17 M.L. J. 444 (P. C.).

that they must carry the meaning settled under the old Code.

SUMMARY.

To sum up, the Nagpur view is objectionable on the following grounds :

- (a) It is against the plain and ordinary meaning of the words in para. 16.
- (b) The outside considerations ad-

vanced for the construction of paras 15 and 16 are not sound.

(c) It is against the Privy Council decision in 29 C. 167.

(d) It not only conflicts with the views held elsewhere, but the weight of opinion is against it.

(e) It is against the intention of the legislature and the previous history of the law.

Sind J. C's Criminal Circular

Contrary to 20 S. L. R. 54.

A criminal circular No. A./1550, dated the 3rd August 1927, bearing the signature of the Registrar of the Judicial Commissioner of Sind, purporting to have been issued under the orders of the Judicial Commissioner has been received by the Bar Association, Sukkur, in the beginning of this month. It, among others, intimates to the Sessions Judges, District Magistrates, the members of the Bar, in Sind, and to all concerned, in its para 3, that applications for transfer will not be entertained by the J. C's Court (except for special reasons) unless an application has been first made to the District Magistrate or the Sub-Divisional Magistrate and disposed of by him.

I had, in my *Critical Note*, on 20 S.L.R. 54, published in the A. I. R. 1927 Journal Section pp. 5 and 23 and 28 Cr. L. Journal of India p. 5, and the Sind Observer, an English daily of Karachi of 27th October 1926, commented upon the Judges' unduly inserting new clauses to S. 526, sub-Cl. (8) and reserved my opinion on the point referred to in the circular; but now that the above has been issued to the detriment of the public and runs counter to the said decision I put forth a few words against it.

In my opinion this circular is not legal, and will not be a safe guide. It cannot have the force of law, it being fully opposed to the recent decision of the Division Bench of the same Court,

consisting of Mr. Kennedy, ex-Judicial Commissioner, and Dr. De Souza, A. J. C. There the Judges have clearly and in most unmistakable terms held (p. 57), after discussing the law and dissenting from 6 Bom. L. R. 480

that an application under S. 526, Criminal P. C., for a transfer of a criminal case lies direct to the High Court, and it is unnecessary that such an application should be made in the first instance to the District Magistrate or the Sub-Divisional Magistrate under S. 528, Criminal P. C.

This considered judgment of the duly constituted Bench of the Judicial Commissioner's Court stands unreversed till this day, the circular not pointing to any Full Bench or Privy Council decision reversing the same.

Throughout the chapter relating to transfer applications, in the Code of Criminal Procedure, Ss. 526-528, both inclusive, there does not exist a word to prohibit the applicants from approaching the High Court direct. The Judges presiding in *Nathoomals* case (20 S. L. R. 54) base their decision on this point on this very ground. The actual words of their judgment are :

There is nothing in the statute which renders it necessary to move the District or Sub-Divisional Magistrate in the first instance.

They go further and remark that :

If the High Court cannot be moved until an order is obtained from the District or Sub-Divisional Magistrate, the trial will be unnecessarily delayed.

In the face of such a clear exposition of the law by the learned Judges of the Judicial Commissioner's Court

and their manifestation of deep desire to do justice cheaply and early, it is inconceivable how a mere circular, which is quite contrary to the ruling, can counteract the force of the provisions of the enacted law and the considered dicta of the Division Bench of the Highest Court of the Province.

It is a matter of common information and knowledge to lawyers and the public alike that circulars can never make law. They are intended solely for the guidance of the subordinates for administrative purposes only, and can never be weighed with judicial decisions.

Apart from its illegality, it is submitted, this circular is bound to affect the applicants pecuniarily or otherwise. Every application, according to it, will have to pass through three Courts, which will undoubtedly mean treble the cost, treble the time and treble the anxiety and vexation due to the same. It clearly imposes restrictions upon the applicants, which the legislature had never meant.

It may no doubt mean some decrease in the inrush of such applications to the Court of the Judicial Commissioner, and, on the other hand, an increase of a few briefs for the mufassal pleaders, but such considerations ought never to prevail in view of the above.

Times out of number various High Courts have sounded a note of warning against the Judges' arrogating to themselves the function of the legislators and encroaching upon the rights of the latter, and inserting new clauses or putting affixes and prefixes to the enacted sections of codes of law, and they should not be ignored in issuing circulars which amount to counteracting the existing decision of the High Court as that would be going against the very spirit of the law.

For the above reasons it is requested the Judicial Commissioner would be pleased to review his order and call back the circular at an early date.

Dist. Court, Pleadings'

Chambers.

20-9-1927 Rochaldas Karamchand
Pleader, Sukkur.

Reviews

Police Diaries and Statements by Mohammad Qalandar Ali Khan, Khan Saheb, M. A., LL. M., ADVOCATE, HIGH COURT, LAHORE and PUBLIC PROSECUTOR—Second edition (1927)—pp. over 450. Price Rs. 5-8-0.

The very fact that the second edition had to be brought out only after about a year of the first edition shows the necessity of a treatise on the subject. Although the subject appears to be short yet, in view of its complexity and obtruseness, it well deserves to be treated in an independent book like this.

In spite of all its amendments, with a view to harmonize the conflicting views, it is doubtful whether the troublesome S.162, of Criminal P.C., in its present form can be considered to settle the law in clear terms. In this edition the author has brought the case-law, dealing with

different branches of the subject, up-to date and the relevant cases have been nicely and intelligently sifted. The relative provisions of the Evidence Act, bearing on the subject, have been clearly set out. The debates in the Legislative Assembly, in the form of an appendix, will certainly be found interesting and the Police Rules and Regulations of the different provinces given in appendix B will be much helpful in the study of the procedure of respective provinces. In fine, this book deserves a place on the shelf of every criminal lawyer, Magistrate and police officer concerned in the conduct of criminal cases. We are glad to observe that the numerous readers of the All-India Reporter will not be disappointed, as references to A. I. R. are not wanting. The printing and get-up are satisfactory.

Jottings

Legal phrases and Idioms

Readers of Serjeant Robinson's Bench and Bar may re-call a pleasant story he tells of Danby, a former wigmaker in the Temple. "One day", says Robinson, a legal friend went to Danby's to have his hair cut, and while the operation was in progress he noticed a boy of about 12 playing in the shop. The customer asked Danby whether the boy was his. "Yes sir," was the reply, "to the best of my knowledge and belief." "And what do you mean to make of him?" was the next question, "Well, sir, as at present advised, and without prejudice, if he turns out a sharp clever fellow I mean to bring him out to my own business, but if he should prove to be, in the efflux of time, a dull, idle block-head—as I think it is not unlikely he will—I shall send him to the Bar." Apart from the humour of the little

incident and its sly hit at the profession, it amusingly exhibits the love of legal expressions which the wigmaker had managed to pick up in the course of his work. Brought into daily contact with lawyers this is not perhaps so very surprising, but it is curious to notice how legal phraseology has entered so largely into our every day speech. Mr. Logan Pearsall Smith, to whose work on Words and Idioms reference was recently made in this column, gives a list of phrases drawn from the law which are in daily use by even the man in the street. "To go bail for," "to hold a brief for," "to join issue with," "a moot point," "special pleading," "possession is nine points of the law," are only a few of the idioms which the law has presented to our current English.

The Law Times Vol. 160 p. 368.

THE
ALL INDIA REPORTER

1927

PRIVY COUNCIL SECTION

CONTAINING

FULL REPORTS OF ALL REPORTABLE JUDGMENTS OF
THE PRIVY COUNCIL REPORTED IN

(1) L. R. 54 INDIAN APPEALS AND
ALL THE JOURNALS PUBLISHED IN INDIA AND BURMA

WITH

EXTRA JUDGMENTS

CITATION: A. I. R. 1927 PRIVY COUNCIL

PRINTED AND PUBLISHED BY

V. V. CHITALEY, B.A., L.L.B.,

AT THE "ALL INDIA REPORTER" PRESS,

NAGPUR, C. P.

1927

(All Rights Reserved.)

TO
THE LEGAL PROFESSION
IN GRATEFUL RECOGNITION OF
THEIR WARM APPRECIATION AND SUPPORT

EDITORIAL COMMITTEE

DEWAN BAHADUR G. S. RAO, *Ex-Judge, High Court, Bombay.*
DR. SUDISH CHANDRA ROY, M.A., LL.B., Ph. D., *Bar-at-Law, Calcutta.*
SIR M. V. JOSHI, Kt., K.C.I.E., *Ex-Law Member, C. P. Government.*
RAO BAHADUR V. R. PANDIT, *Bar-at-Law, Nagpur.*
MR. E. VINAYAKA RAO, B.A. B.L., *Vakil, High Court, Madras, Editor, Journal*
MR. V. V. CHITALEY, B.A., LL.B., *High Court Vakil, Nagpur.* [Section.]

EDITORIAL STAFF

MR. S. G. GADGIL, B.A., LL.B., *High Court Vakil, Bombay.*
MR. G. B. JOSHI, B.A., LL.B., *Pleader, Nagpur.*
MR. D. D. DATAR, B. Sc., LL.B., *Pleader, Nagpur.*

REPORTERS

Privy Council

(1) Dr. A. Majid, LL.D., *Bar-at-Law, London.*

Allahabad

(2) Mr. Saila Nath Mukerji, B.A., B.L., *Vakil, High Court, Allahabad.*

Bombay

(3) Mr. B. K. Desai, M.A., LL.B., *Advocate, High Court, Bombay.*
(4) Mr. S. C. Joshi, M.A., LL.B., *Advocate, High Court, Bombay.*
(5) Mr. B. D. Mehta, B.A., LL.B., *Vakil, High Court, Bombay.*

Calcutta

(6) Mr. Pramatha Nath Banerjee, M.A., B.L., *Vakil, High Court, Calcutta.*
(7) Mr. Narain Chandra Kar, B.L., *Vakil, High Court, Calcutta.*

Lahore

(8) Mr. Amolak Ram Kapur, B.A. (Hons.), LL.B., *Advocate, High Court, Lahore.*
(9) Mr. Anant Ram Khosla, B.A., (Hons.), LL.B., *Advocate, High Court, Lahore.*
(10) Mr. Kedar Nath Chopra, B.Sc., LL.B., *Advocate, High Court, Lahore.*

Madras

(11) Mr. P. R. Srinivasa Iyengar, M.A., B.L., *Vakil, High Court, Madras.*
(12) Mr. N. Srinivasa Iyengar, M.A., B.L., *Vakil, High Court, Madras.*

Nagpur

(13) Mr. M. Bhawani Shankar Niyogi, M.A., LL.M., *Advocate, High Court,*
(14) Mr. K. V. Deoskar, B.A., B.L., *High Court Pleader, Nagpur.* [Nagpur]

Oudh

(15) Mr. Surendra Nath Roy, M.A., LL.B., *Vakil, Lucknow.*

Patna

(16) Mr. Subal Chandra Muzumdar, M.A., B.L., *Vakil, High Court, Patna.*
(17) Mr. Laxmidhar Mahanty, B.A., B.L., M.L.C., *Vakil, Circuit Court, Cuttack.*

Rangoon

(18) A. J. Robertson, *Bar-at-law, Rangoon.*
(19) K. C. Sanyal, M.A., B.L., *Advocate, Mandalay.*

Sind

(20) Mr. P. K. Vaswani, LL.B., *Bar-at-law, Karachi.*

THE ALL INDIA REPORTER 1927

PRIVY COUNCIL NOMINAL INDEX

[51 CASES]

Absence of star denotes Cases of Provincial or Small Importance

* Indicates Cases of Great Importance

* * Indicate Cases of Very Great Importance

A		K	
* * Abadi Begum, Mt. v. Mt. Bibi Kaniz Zainab	2	* Kachireddi Nagireddi v. S. C. Narayana Reddi	27
* * Abdul Rahman v. Emperor	44	* * Kuikhushroo Rustomji Wallace v. Bombay Co. Ltd.	210
Abdul Wahab Khan v. Tilakdhari Lal	208	* * Kala Chand Banerji v. Jagannath Marwari	108
Andrahennedige Dinohamy v. Wijetunge Liyanapatabendige Balahamy	185	* * Kalyanasundaram Pillai v. Karuppa Mooppanar	42
B		Keshava Prasad Singh v. Secy. of State	89
* * Balla Mal v. Ata Ullah Khan	191	* Keshoram Poddar v. Nundo Lal Mallick	97
* * Banku Behari Chatterji v. Narain Das Dat	73	* * Krishnamurthi Ayyar v. Krishnamurthi Ayyar	139
* Barkatunnissa Begum, Mt. v. Debi Baksh	84	* Krishnaendra Nath v. Kusum Kamini Debi	20
* Basiram Saha Roy v. Ram Ratan Roy	117	L	
* Bhagechand Dagdusa v. Secy. of State	176	* Lalit Mohan Pal v. Dayamoyi Roy	41
* British America Nickel Corporation Ltd. v. M. J. O'Brien, Ltd.	62	* * Laxmanrao Madhavrao Jahagirdar v. Shrinivas Lingo Nadgir	217
* * Bull, A. H. Co. v. West African Shipping Agency and Lighterage Co.	178	* Lingangowda Dod-Basangowada v. Bastangowda Bistangowda	56
C		M	
* * Cates J. A., Tug and Wharfage Co. Ltd. v. Franklin Fire Insurance Co. Philadelphia	188	Madat Khan v. Emperor	26
* Chattra Kumari Devi v. W. W. Broucke	250	* * Mahant Rai v. Laohhmina Kunwar	123
* Chockalingam Chetty v. Seethai Ache	252	* * Ma Hnit v. Fatima Bibi	99
D		* * Ma Mi v. Kallander Ammal	15
* * Daing Soharah Binte Daing Todaleh v. Chabak Binte Lasaliho	148	* Ma Mi v. Kallander Ammal	22
* * Delhi Cloth and General Mills Co. v. Income Tax Commissioner, Delhi	242	Ma Ou v. Maung Tin	105
Deo Narain Pande v. Agyan Ram Pande	52	* Mehdi Ali Khan v. Ghanshiam Singh	204
* Dhanna Mal v. Moti Sagar	102	Mukand Singh v. Emperor	215
Dwarka Nath Singh v. Keshri Mall	111	* Mukund Dharman Bhoir v. Balkrishna Padmanji	224
F		N	
* Firm, V. E. A. R. M. v. Mg. Ba Kyin	237	Nand Rani Kunwar v. Mt. Inder Kunwar	8
* Fitzholmes v. Bank of Upper India, Ltd.	25	Narayan Das v. Jatindra Nath	135
G		* Nayan Munjari Dasi v. Khagendra Nath Das	116
* * Gangi Reddli, T. B. v. T. B. Tammi Reddi	80	* * Niamat Rai v. Din Dayal	121
* Gauri Shankar v. Jiwan Singh	246	P	
I		* * Pathumsa Ammal v. Rajagopala Mudaliyar	17
* * Indar Prasad v. Jagmohan Das	165	* * Po Nyun, Maung v. Ma Saw Tin	234
J		Protap Chandra Deo v. Jagadish Chandra Deo	159
* * Jagannath Prasad Singh v. Surajmal Jalal	1	* Punjab Cotton Press Co., Ltd. v. Secy. of State	72
Jagmohan Saran v. Deoki Nandan	229		
* * John Agabog Vertannes v. James Golder Robinson	151		

R

••Radha Benode Mandal v. Gopal Jin Thakur	128
Radha Kishun v. Hiralal Sah	50
••Raghunath Prasad Singh v. Deputy Commissioner of Partabgarh	110
•Ramarayaningar v. V. Govinda Krishna	32
•Ramgowda Annagowda Patil v. Bhausaheb	227
•Ramsaran Mandar v. Mahabir Sahu	18

S

••Sachidanand Vidya Shankar v. Vidya Narasinha Bharoti	57
••Saheb Rai v. Shafiq Ahmad	101
Saleh Mahomed Umer Dossal v. Nathoomal Kossamal	164
•Sardar Gurbakhsh Singh v. Gurdial Singh	230
•Sassoon, M. A. & Sons, Ltd. v. International Banking Corporation	195
Sasti Kinkar Banerjee v. Hursookdas Chogemull	162
••Sathappa Chetty v. S. N. Subrahmanyam Chetty	70

•Secy. of State v. Mt. Girjabai	
----- v. Tarak Chandra	
Setupati, Raja Rajeswara v. Muthaunan Servai	
••Sheobaran Singh v. Mt. Kulsu-munnissa	
••Shiam Sundar Singh v. Jagannath Singh	
•Sin, Maung v. Ma Tok	
•Sonaton Pal v. J. C. Galstaun	
Souiram Jeetnull v. R. D. Tata & Co. Ltd.	
••Sri Krishan Das v. Nathu Ram	
•Suraj Bhaui Singh v. Sah Chain Sukh	

V

••Vibhudapriya Thirtha Swamiar v. Lakshmindra Thirtha Swamiar	
---	--

W

••William Richard v. Commissioner of Taxes	
•William Robins v. National Trust Co. Ltd.	

THE
ALL INDIA REPORTER
1927

PRIVY COUNCIL
SUBJECT INDEX

Absence of star denotes Cases of Provincial or Small Importance.

* Indicates Cases of Great Importance.

* * Indicate Cases of Very Great Importance.

B

Bengal Alluvion and Diluvion Regulation (1 of 1825)

—S. 4—Land washed away by a river and re-formed in same place is not "gained" within S. 4 though land on opposite sides of the river is owned by different owners 89a

Bengal Estates Partition Act (5 of 1897)

—S. 99—The Act does not apparently contemplate any tertium quid between common tenancy and several holding 117b

—S. 99—Grants of a share in specified mouzas which are themselves only portions of an estate held in common tenancy come under S. 99 117d

Bengal Land Revenue Sales Act (11 of 1859)

—S. 3—Land sold under the Act—Land entered in the register passes to auction purchaser but not the buildings standing thereon 135a

Bengal Tenancy Act (8 of 1885)

*—S. 74—'Malguzari' means revenue 250a

—S. 74—'Annual rental agreed to be paid in kabuliyat' must be paid 250b

—S. 74—"Actual rent," meaning explained 250c

Bombay District Police Act (4 of 1890)

—Ss. 25, 25-A and 79—Errors in notification are immaterial if provisions are substantially followed 176d

—Ss. 25 and 25-A—Actual complicity of persons to be taxed is immaterial 176e

—S. 25-A—Order directing enquiry whether persons to be charged were with Government during riots—Omission to enquire is not an illegality 176b

—S. 25-A (1) (a) and (1) (b)—Action under S. 25-A (1) (b) is not judicial—District Magistrate may act with consultation with superior officers—Taxing is not restricted to one occasion only 176c

—S. 26 (1), Proviso—"In default of recovery" does not mean wilful default by Municipality—If old levy is superseded by new one, S. 26 (1) must be again complied with 176b

Bombay Hereditary Offices Act (3 of 1874)

—A suit for refund of contribution under Act 3 of 1874 is barred unless exempted by Act 11 of 1852 217c

Bombay Revenue Jurisdiction Act (10 of 1876)

—S. 4—S. 4 precludes a Court to entertain a claim to cancel watan register 217a

—S. 4—A suit for refund of contribution under Act 3 of 1874 is barred unless exempted by Act 11 of 1852 217c

Bombay Titles to Rent free Estates Act (11 of 1852)

—A suit for refund of contribution under Act 3 of 1874 is barred unless exempted by Act 11 of 1852 217c

Buddhist Law (Burmese)

*—Divorce—Wife deserted and hence obtaining divorce—She cannot get husband's whole property 234a

—Divorce—Wife granted one-third of husband's property on divorce—Decree was upheld by Privy Council 234b

—Jewels worn by a Burmese lady and taken by her to various places where she went—Presumption is that they were hers 105

C.

Calcutta Rent Act (3 of 1920)

—S. 18—Case started before amendment of the Act in 1924 is governed by old Act 97a

Ceylon Law

—Marriage—Persons living as man and wife should be presumed to be legally married 185a

Civil Procedure Code (5 of 1908)

—S. 1—Regulation of civil procedure is not subject to Government of India Act (1858), S. 65 176g

*—S. 11—Suit against several defendants—Other defendants deriving title from first defendant—Suit dismissed against all—First defendant not joined in appeal—Decision of trial Court is res judicata as between plaintiff and other defendants also 252b

**—S. 11—First suit by shebait for framing a scheme of management against other shebait—Second suit by gods themselves through one member of the deity's family against other members for declaration that the properties are debuttar—Second suit is not barred 128

Civil P. C.

*—S. 11—Parties—A person who applied to be made a party but was refused is not bound by the decision in the suit 10

**—S. 11—Review against decree enhancing rent of a tenancy and holding it to be permanently dismissed, holding however that judgment as regards permanent nature thereof was based on misapprehension—Judgment is not res judicata on the point of permanent nature 102

*—S. 11, Expl. 6—Hindu family—Each member cannot be allowed to litigate the same point over again 56

**—S. 24—Mortgage suit—Question of interest is determined by O. 34 and not by S. 34 1a

**—S. 80—Two months' time must be allowed in all kinds of suits: 35 B. 362=10 I. C. 639; 37 B. 243=17 I. C. 876 and 40 B. 392=34 I. C. 535, Overruled 176a

*—S. 100—Findings of fact—High Court as well as Privy Council are bound to accept 117a

*—S. 100—Whether tenancy is permanent is a question of law 102c

**—S. 110—Substantial question of law means one substantial between parties and not one of general importance 110

**—O 1, R. 10—Partnership—Suit for dissolution—Person who together with the firm forms a superior partnership is not a necessary party 70a

*—O 1, R. 10 (2)—Rights of party added under R. 10 (2) are safeguarded by Limitation Act, S. 22 252c

*—O. 6, R. 17—Amendment changing nature of suit is not permissible—Even if permissible it cannot be allowed in appeal to Privy Council 18b

*—O. 21, R. 58—Property sold attached by vendor's creditor—Creditor must show that the sale was fraudulent 237

**—O. 23, R. 1—Compromise decree—Transfer pending suit—Compromise between transferee and opposite party is valid

Civil P. C.

- though transferrer is not joined although he continued to be a party to suit 57
- *—O. 23, R. 3—Hindu law—Father can compromise suit in respect of adopted son's share in joint family property 204
- **—O. 32, R. 16—A person renouncing world and neglecting worldly affairs—He is not thereby incapable of protecting his interest within R. 15—But delusions of being haunted by demons, persecution by imaginary voices, etc., would justify a contrary inference 123b
- **—O. 34, and S. 34—Mortgage suit—Question of interest is determined by O. 34 and not by S. 34 1a
- **—O. 34 — Till expiration of period of redemption contract rate of interest will be allowed—Six months' period of redemption will be counted from the date of appellate decree where the first Court's decree is varied: [see also A.; I., R. 1927 P. C. 25] 1b
- *—O. 34, R. 1—Object — The object of O. 34, R. 1 is that all claims affecting the equity of redemption should be disposed of in one and the same suit 32c
- O. 34, R. 2—Accounts—Failure to take accounts is not material if amount would be the same as in decree 17a
- *—O. 34, R. 5 (2)—Mortgage suit — Preliminary decree appealed from—Time for applying for final decree runs from appellate decree though it confirms the lower Court's decree 25
- **—O. 24, R. 6—Several mortgagees having decrees in the same suit—Last mortgagee must not wait for previous mortgagees to take steps to entitle him to personal decree—Right to personal decree accrues when final decree is made though personal decree can be made only after exhausting property by sale 73a
- **—O. 34, R. 7—Time for redemption—It is not an absolute rule of law that less than six months

Civil P. C.

- cannot be allowed for redemption 17b
- *—O. 40, R. 1—Large debts contracted by a mutt—Income ton sufficient to meet expenses and also to pay off debts—Receiver was appointed 131b
- *—O. 41, R. 20—Suit dismissed—Defendant not joined in appeal against other defendants is not interested in the result of the appeal 252d
- *—O. 41, R. 27—Statements of witness in proceedings under Lunacy Act commenced after dismissal of suit between same parties were admitted at appellate stage 123c
- *—O. 41, R. 33—Plaintiff's suit dismissed—Plaintiff appealing but joining some defendants only as respondents—Refusal of appellate Court to join the remaining defendants as parties after limitation was held proper 252e
- Sch. 2, para. 15—Error on the face of award—Mistake in construing contract referred to in award but not incorporated in it is not 164
- Companies Act (7 of 1913)**
- *—S. 20—(English Act of 1908, S. 13)—Power to modify terms on which debentures are secured—Power must be exercised in the interest of a class as a whole 62
- Company**
- **—Income-tax—Sale of whole concern shown as at profit—Profit is not taxable in all cases 76
- Compromise**
- *—Construction—Terms providing for payment of prevailing rate of rent—Rent was held enhanceable 116
- Contract**
- **—Construction—Account books though recording merely result of transactions are assumed to contain principles on which the distribution of results takes place 210
- *—Offer and acceptance—Assured tendering notice of abandonment of boat insured against total loss on boat being sunk—Notice not accepted—Boat raised—Underwriters inviting offer from sal-

Contract

vers for purchase of the boat does not constitute acceptance of abandonment 188a

Contract Act (9 of 1872)

*—S. 16—Gift to person in fiduciary relation—Donee must prove that gift was outcome of donor's free will and not of his influence 148

—S. 16—Mere need of money is no test of domination of will 84a

—S. 49—Contract silent as to place of payment of liability—Payment should be made where creditor is—Intention of parties to the contract must be seen 156

—S. 60—Debtor alleging appropriation in a particular way—Onus is on debtor to prove his allegation 50a

—S. 253 — Dissolution — Filing plaint in a suit for dissolution by one partner is enough of itself to put an end to a partnership at will 70b

Cosharers

—Partition held proved among different holders of the estate in question 208

Criminal Procedure Code (5 of 1898)

—S. 234—First charge under S. 120-B and 109—Other charges for specific offences in pursuance of criminal conspiracy including more than three murders within one year—Trial was held to be legal by the High Court—Privy Council dismissed petition for special leave 215

*—S. 360—Object of reading over is to obtain accurate record from the witness and not to enable accused to suggest corrections 44c

*—S. 360—Accused not knowing Court's or witness' language—Deposition, after it is read over to witness, need not be interpreted to the accused 44d

*—S. 360—Provision as to reading over should be complied with except where it will be absurd 44e

*—S. 360—Mere non-compliance with S. 360 is not enough to quash conviction 44g

Criminal P. C.

**—Ss. 535 and 537—Mere non-compliance with S. 360 is not enough to quash conviction 44g

*—S. 537 (d) — "Unless such error", etc., in Cl. (d) qualifies all clauses 44f

*—S. 537 — Two factions fighting—Factions separately tried—Evidence similar in both—Independent evidence sufficient for conviction — Disposal by one judgment by appellate Court was upheld as no injustice was caused 26

Criminal Trial

*—Serious defect in conducting trial cannot be cured by consent of accused's advocate 44b

Custom

—Custom proving well-established adjunct to ordinary law can be easily proved 113d

D**Deed**

*—Construction — Clause deleted in a printed form — Effect is same as if the clause never existed 195b

—Execution — Deed involving extinction of rights and degradation of status of one party—Party not protected by notary—Transaction is bad 185b

—Execution — Where a deed written in English was signed by a lady who did not know English and the deed deprived her of her legal rights of succession and degraded her status: *Held*: that the deed was no bar to her rights under the law 185c

E**Estoppel**

—See EVIDENCE ACT, S. 115

Evidence Act (1 of 1872)

*—S. 33—Statements of witness in proceedings under Tenancy Act commenced after dismissal of suit between same parties, were admitted at appellate stage 123c

**—S. 24—Account books though recording merely result of transactions are assumed to contain principles on which the distribution of results takes place 210

*—Ss. 63 and 60—Oral evidence to be secondary evidence of the

Evidence Act

- contents of a document must be of persons who have read the document 15a
- *—S. 115—Hindu law — Reversioner taking benefit of widow's transaction cannot set it aside 227
- *—S. 115—Co-pareener's right to partition is not affected by his father's executing a deed on the basis that there was no joint family or family property 224
- S. 115—Person misled by mistaken legal advice and not by representations by another person—The other is not estopped 151d
- S. 116—Tenant cannot challenge title of his landlord 151c

G

Gift

- **—Condition to pay maintenance allowance to donor by donee not observed by donee — Property gifted can be recovered by donor 123a

Government of India Act (1858)

- S. 65 — Regulation of civil procedure is not subject to S. 65 176g

Grant

- *—Construction—A grant in respect of its amplitude is always construed (unless it be a Crown grant) against the grantor 117c

H

**Hindu Law

- Adoption — Pre-adoption agreement—Natural father consenting—Agreement is valid by custom to the extent of creating life interest in widow even in whole property 139
- Alienation — Practice of settling cases by accounting not approved 246a
- *—Alienation—Necessity—Small part of consideration not proved for necessity—Sale should be upheld 246b
- *—Alienation by widow — Very small portion of consideration found not for necessity—Sale was upheld 244
- **—Alienation by manager—Covenant by manager to indemnify vendee against loss if minor

Hindu Law

- members challenged alienation is a reasonable precaution 121a
- **—Alienation by manager for discharging old debts of family business and to carry it on is justified 121b
- Alienation by co-pareener — Power by two brothers to third to mortgage family property — Mortgage by the third to pay debts binding on family is valid 111
- **—Alienation by manager for religious charity is valid, but it must be inter vivos and not by will: 45 Mad. 281, Reversed 80a
- *—Father can compromise suit in respect of adopted sons in joint family property 204
- Impartible estate is alienable in the absence of a custom to the contrary—Burden is on person alleging such custom — Absence of alienation in respect of an estate is no proof of such custom 159a
- Impartible estate — Alienability—Estate held as ordinary zemindari for upwards of a century—Ancient nature of zamindari has no bearing 159b
- Impartible estate—A member is not entitled to maintenance from an impartible estate unless he establishes a right to maintenance by custom or relationship or in some other way 159c
- *—Joint family — Copareener has indefeasible right of partition 224
- **—Joint family business resulting in loss—Whether manager should put in more money or mortgage property rather than sell it are questions for the manager and not for the lender or purchaser 121c
- *—Joint family—Each member cannot be allowed to litigate the same point over again 56
- Joint family — Separation—Where jointness up to a certain date is proved, the onus of proving a separation subsequent to that date is on the party alleging such separation 52
- **—Joint family—Alienation by father — Suit to set aside—

Hindu Law

- Necessity as to a portion of consideration not proved—Question is whether the sale as a whole was for legal necessity—Where sale is for necessity, whole amount will be presumed to have been expended for family benefit — Bona fide purchaser after due enquiry is not bound to return money not spent for necessity to members challenging sale : 86 I. C. 91 = A. I. R. 1925 All. 324 = 47 All. 355, **Overruled.** 37
- *—Limited owner — Decree against widow binds her and not the estate unless specific intention appears to that effect 41
- **—Partition—Stepmother given a share for maintenance with responsibility of a share of husband's debts—Share so allotted should be deemed as her absolute estate 101
- *—Religious endowment — Mutt — Head of — Money borrowed for feeding Brahmins in accordance with custom and rebuilding dilapidated structures of the mutt is for necessity 131a
- **—Religious endowment—Where profits of a mortgagee were not all applied to charity but were merely created as the purse from which the expenses of the charity were met. *Held* that there was no dedication of mortgage to charity: 45 Mad. 281, **Reversed** 80b
- *—Reversioner taking benefit of a widow's transaction cannot set it aside 227
- *—Suit for specific performance of agreement to sell joint Hindu family property by karta—Sons and grandsons impleaded—Death of karta pending suit—Relief as to specific performance abandoned — No decree can be passed against sons and grandsons 18a

I**Income-tax**

- **—Sale of whole concern shown as at profit—Profit is not taxable in all cases 76

Income-tax Act (11 of 1922)

- (Amended 1926)—S.8—Scope—
Act is not retrospective 242c
**—S. 66-a (2) and (3)—Appeal to Privy Council lies only if case is certified as fit by High Court 242a

Insurance

- **—Marine—Ship insured against total loss — Sinking of ship is not necessarily total loss 188b

Interest

- Compound—Burden of proof—
The burden is on the creditor of proving an agreement to pay compound interest 50b

Interpretation of Statutes

- Provisions touching existing rights are not ordinarily retrospective — Existing rights explained 242b
*—The application of an Act is to be seen when the parties begin to move under it 97b

L**Land Acquisition Act (1 of 1894)**

- S. 3 (a)—" Permanently fastened "—The epithet " permanently ", is used as an antithesis to " temporarily " 172
—Ss. 29 and 30 — Land and buildings thereon owned separately—Principles of apportionment discussed 135c

Landlord and Tenant

- *—Permanent tenancy — Facts not constituting permanent tenancy described 102d
*—Ordinarily landlord can apply for enhancement and the tenant for reduction of rent—Usually " mokarari " is used to denote fixity of rent but absence of this word is not conclusive to the contrary 20

Lease

- Construction 206

Limitation Act (9 of 1908)

- *—S. 22—Rights of party added under Civil P. C., O. 1, R. 10 (2) are safeguarded by S. 22 252c
*—Arts. 2 and 36 — Plaintiff's property suffering damage by canal being cut—Canal cut to avoid damage to adjacent railway—Art. 2 does not apply—
4 Lah. 428 = A. I. R. 1924 Lah. 169 = 79 I. C. 208 and
4 Lah. 432 = A. I. R. 1924 Lah. 192 = 79 I. C. 185, **Reversed** 72

Limitation Act

—Art. 14 — Enforcement of an illegal order gives a fresh start **A. I. R. 1922 Bom. 18, Reversed 217b

*—Art 36 — Plaintiff's property suffering damage by canal being cut to avoid damage to adjacent railway—Limitation Act Art. 2 does not apply: **4 Lah. 428 = A. I. R. 1924 Lah. 169 and 4 Lah. 432 = A. I. R. 1924 Lah. 192, Reversed** 72

**—Art. 97—Mortgage property sold in execution of mortgage decree and purchased ultimately by mortgagee — Mortgagee dispossessed by decree of competent Court in suit by a person claiming the property alleging the mortgage not binding upon him — Suit for return of consideration—Time runs from date of decree dispossessing him 99

—Art. 118 — Suit in substance for declaring an adoption invalid is covered by Art. 118 229

*—Art 181 — Mortgage suit—Preliminary decree appealed from — Time for applying for final decree runs from appellate decree though it confirms the lower Court's decree 25

*—Art. 182 (7)—Decree directing payment of annuity and, in default, delivery of certain property to decree-holder—Each instalment of annuity is a claim under decree and each default gives rise to right to recover property 146

**—Art. 183 — Application for transfer of decree is not revival of decree 73b

M

Mahomedan Law

—Gift to wife—Mutation of wife's name effected—Possession of husband will be presumed to be on behalf of wife 22b

*—Divorce can be effected by mere words—When words are clear no proof of intention is necessary—Pronouncement need not be made in presence of the wife 15b

**—Waqf—Shiah law—Gift must be perpetual and unconditional—

Mahomedan Law

Settlor must give up possession and must not be eating out of the waqf 2a

*—Waqf — Settlor appointing himself mutawalli—Mutation of names is the usual means of divesting of possession 2b

Master and Servant

—Servant lent to another for particular employment—Person to whom servant is lent is responsible for loss caused by the servant during that employment 173

Maxims

*—Whatever is affixed or built on land becomes part of it, has a limited application in India 135b

Mussalman Waqf Validating Act (6 of 1913)

**—Act is not retrospective—For validity of waqfs prior to the Act there must be substantial dedication to charitable purposes —Settlor may provide for himself and his dependants for their lives—Provisions of the deed must be looked to rather than the language 191

—S. 2—Wakf—Definition is not exhaustive 22

N

Negotiable Instruments

*—D/A drafts—Discounting with a bank—Confirmed credit therefor provided in another bank—Drafts dishonoured after acceptance—Documents of title delivered to consignee on acceptance of drafts—Claim against drawers —Delivery of documents not unreasonable—Drawers are liable in the absence of express contract negating recourse or breach of contract or other duty having that effect—Discounting is not an out and out sale 195a

Northern India Canal and Drainage Act (8 of 1873)

—S. 15—Plaintiff's property suffering damage by canal being cut—Canal cut to avoid damage to adjacent railway—Limitation Act, Art. 2, does not apply: **4 Lah. 428 = A. I. R. 1924 Lah. 169 and 4 Lah. 432 = A. I. R. 1924 Lah. 192, Reversed** 72

O

Oaths Act (10 of 1873)

- ** —S. 8—Neither invocation nor oath or affirmation is necessary—Oath under S. 8 is different from one under S. 5—For an oath under S. 8, no preliminary oath under S. 5 is necessary—Oath under S. 8 is not dependent on any discretion of Court 165a
- ** —S. 8—"Oath and solemn affirmation"—Significance explained 165b

P

Pardanashin Lady

- * —Nature of transaction must be looked to with other circumstances 84b

Practice

- * —Witness—Party should be offered as witness 230
- * —Unnecessary documents printed—Solicitor should select the necessary documents 60b
- * —Evidence—Application to admit evidence made at a late stage—Applicant must show absence of want of diligence on his part 27b
- * —(Bengal) — Privy Council—Printing records — Objection raised—Registrar of the High Court should decide 60a

Criminal

- * —Privy Council—Appeal to, is restricted to very special grounds 44a

Pre-emption

- ** —Sale by Official Assignee is affected by right of pre-emption as a private sale 113c

Presidency Towns Insolvency Act (3 of 1909)

- S. 22—Insolvency proceedings pending in Birbhum Court—Calcutta Court in its discretion starting insolvency proceedings against the same person—Calcutta Court was held to have jurisdiction to so start and Privy Council did not interfere with its discretion 162

Privy Council

- * —Findings of fact—High Court as well as Privy Council are bound to accept 117d
- * —Rule as to concurrent findings applies to all judicatures subordinate to Privy Council 66b

Privy Council

- Concurrent findings of two Courts—Second appeal Court will not ordinarily interfere 66c
- * —Considerable evidence both ways—Concurrent finding of fact will not be disturbed 27a
- * —Amendment changing nature of suit is not permissible—Even if permissible it cannot be allowed in appeal to Privy Council 18b

Probate and Administration Act (5 of 1881)

- ** —S. 4—Property not covered by will disposed of by executor as his own without dividing it among sharers—Vendee knowing the terms of will cannot acquire good title 151b

Provincial Insolvency Act (3 of 1907)

- ** —S. 16, Cl. (4)—Property devolving on insolvent vests in receiver as from date of devolution, whatever the date of Receiver's appointment 108a
- ** —S. 16, Cl. 15—After adjudication secured creditor must deal with Court or Receiver and not the insolvent 108b
- * —S. 59 — Property sold by insolvent prior to insolvency and in possession of the purchaser—Sale of such property by Official Assignee is in substance a sale of right to litigate 252a

Q

Question of Law

- See CIVIL P. C., S. 100.

R

Receiver

- See CIVIL P. C., O. 40.

Registration Act (16 of 1908)

- ** —S. 17 (d)—Declaration purporting to set forth the terms of tenancy requires registration 102c

Res judicata

- See CIVIL P. C., S. 11.

Riparian owners

- Land washed away by river and re-formed in same place is not "gained" within S. 4, Bengal Alluvion and Diluvion Regulation (11 of 1825), though land on opposite side of the river is owned by different owners 89a
- Custom as to accretion was held not proved 89b

S

Saranjam

- *—Resumption by Government—
Not only land revenue but all
benefits secured by the grantee
in virtue of the grant go to
Government: A. I. R. 1925
Bom. 197, Reversed 238
- Succession Act (10 of 1865)**

- **—S. 54—Father making will
and calling upon sons to sign it
as token of consent and to avoid
quarrels among themselves—
Sons so signing do not sign as
attesting witnesses 248

T

**Transfer of Property Act (4
of 1882)**

- S. 1—Extension of the Act—
Local Government has no power
to extend a particular provision
so as to give it an effect not con-
templated by the Act 22c
- *—S. 6—Property sold by insol-
vent prior to insolvency and
in possession of the purchaser—
Sale of such property by Official
Assignee is in substance a sale of
right to litigate 252a
- *—S. 61—Mortgagor must pay off
all charges on the mortgaged
property in favour of the mort-
gagee to effect redemption 32a
- *—S. 61 and 62—S. 62 is not
inconsistent with S. 61 32b
- S. 68—Mortgage property sold
in execution of mortgage decree
and purchased ultimately by
mortgagee — Mortgagee dispos-

Transfer of Property Act

- essed by decree of competent
Court in suit by a person
claiming property alleging the
mortgage not binding upon him
—Suit for return of considera-
tion—Time runs from date of
decree dispossessing him 99
- *—S. 91—Mortgagor must pay
all charges on the mortgaged
property in favour of the mort-
gagee to effect redemption 32a
- **—S. 123—Gift-deed duly execu-
ted and attested but not regis-
tered—Gift accepted by donee—
Donor cannot revoke 42

W

Wajib-ul-arz

- Construction—Custom of pre-
emption was held proved 113a
- Record of custom of pre-emp-
tion is good evidence 113b
- Unless contrary is shown,
record of pre-emption is one of
custom 113c

Will

- **—Construction—"Effects" may
mean moveable and immovable
property 151a
- *—Testamentary capacity—Exis-
tence as to, is a question of fact 66a
- *—Testamentary capacity—Pro-
pounder has to prove existence
thereof 66d

Words

- *—'Malguzari' means revenue 250a
- *—'Mukarrari' is used usually to
denote fixity of rent, but its
absence is not conclusive to the
contrary 20

A. I. R. 1927 PRIVY COUNCIL

Supplement to Nominal Index

A		K	
Alwar Naidu v. Kothandapani Naidu	261	Kojo Pon v. Atta Fua	264
Arunachala Nayudu v. S. R. Balakrishna & Co.	266	Krishna Reddy v. Raghava Reddy	257
D		M	
De Silva v. De Silva	263	Mancho Anego Akue v. Mancho Kojo Ababio	262
G		R	
George Richards Laffer v. Francis Arnold Gillen	275	Royal Bank of Canada v. Joseph Salvatori	272
		S	
		Sunmonu v. Disa Raphael	270

Supplement to Subject Index

Adverse Possession

—African law — According to native ideas of West Africa, land belongs to family or community and not to individual—Son though holding exclusive possession of the land after father's death holds it on behalf of the family and cannot acquire title by lapse of time 270

African law

—Joint family — According to native ideas of West Africa, land belongs to community or family but not to individual — Son, though holding exclusive possession of the land after father's death, holds it on behalf of the family and cannot acquire title by lapse of time 270

Civil Procedure Code

—S. 100—Finding of lower appellate Court is binding on High Court unless there is no evidence to support it 257
—O. 41, R. 10—Security for costs—Surety bond signed by representative of appellant — His authority must be proved—Appellate Court should not do—1927 Indexes (P.C.)--3.

Civil P. C.

side the appeal on such point, but should allow proof of such authority to be given 264b

Contract Act

—S. 124—Contract of guarantee —Guarantor undertaking to pay creditor certain sum if creditor would continue to deal with debtor—Creditor not continuing to deal—Guarantor is not bound to fulfil the contract 272a

Deed

—Construction—Principles explained 275
—Construction—Intention must be seen 272b

Evidence

—Appreciation—The finding of trial Court on the oral evidence should not be lightly interfered with 266

Land Acquisition

—Land in exclusive possession of a person—He has prima facie claim to the compensation 262

Mortgage

—Satisfaction—In a suit on mortgage, defendants set up a

Mortgage

case of discharge, relying on the fact that the mortgage-deed had come into their possession and purported to bear an endorsement of discharge by the plaintiffs' father. Plaintiffs alleged that the document was stolen from them. It was found that the defendants had deposited with the plaintiff's father the title-deeds of the mortgaged property at the time of the mortgage and they were still in possession of the plaintiffs. *Held*: that that fact considerably weakened the presumption in favour

Mortgage

of defendants arising from the possession of the mortgage document

261

Privy Council

—Practice — In cases coming before the Privy Council from the Dominions of the Crown first consideration of the Privy Council always is to secure if possible that substantial justice is done

264a

—Practice—Action for divorce
—Damages awarded to husband
—Decision as to amount will not be disturbed by Privy Council

263

THE ALL INDIA REPORTER

1927 PRIVY COUNCIL

COMPARATIVE TABLES

(PARALLEL REFERENCES)

Hints for the use of the following Tables

Table No. I.—This Table shows serially the pages of LAW REPORTS, INDIAN APPEALS for the year 1927 with corresponding references of the ALL INDIA REPORTER.

Table No. II.—This Table shows serially the pages of other REPORTS and JOURNALS for the year 1927 with corresponding references of the ALL INDIA REPORTER.

Table No. III.—This Table is the converse of the **First** and **Second Tables**. It shows serially the pages of the ALL INDIA REPORTER for 1927 with corresponding references of all the JOURNALS including the LAW REPORTS, INDIAN APPEALS and the INDIAN LAW REPORTS.

TABLE No. I

Showing serially the pages of LAW REPORTS INDIAN APPEALS, for the year 1927 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of L. R. 54 INDIAN APPEALS.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

L. R. 54 Indian Appeals=All India Reporter

L. A.	A. I. R.		L. A.	A. I. R.		L. A.	A. I. R.		L. A.	A. I. R.		L. A.	A. I. R.		L. A.	A. I. R.			
1	1927	PC	1	79	1927	PC	87	152	1927	PC	97	238	1927	PC	128	359	1927	PC	238
5	"	"	8	89	"	"	42	156	"	"	89	248	"	"	139	372	"	"	191
23	"	"	22	96	"	"	44	178	"	"	102	265	"	"	156	380	"	"	217
33	"	"	2	111	"	"	57	187	"	"	172	272	"	"	146	396	"	"	227
45	"	"	215	118	"	"	60	190	"	"	108	276	"	"	151	403	"	"	234
48	"	"	20	122	"	"	56	196	"	"	117	289	"	"	159	413	"	"	224
52	"	"	25	126	"	"	110	204	"	"	113	301	"	"	165	421	"	"	242
55	"	"	18	129	"	"	73	211	"	"	121	317	"	"	195	427	"	"	164
61	"	"	15	136	"	"	80	218	"	"	135	317	"	"	195	427	"	"	164
68	"	"	32	145	"	"	99	228	"	"	181	338	"	"	176	432	"	"	250

TABLE No. II

Showing serially the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1927 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of other JOURNALS.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

All Non-I.A. Jour-nals.	A. I. R.	All Non-I.A. Jour-nals.	A. I. R.	All Non-I.A. Jour-nals.	A. I. R.	All Non-I.A. Jour-nals.	A. I. R.	All Non-I.A. Jour-nals.	A. I. R.
-------------------------	----------	-------------------------	----------	-------------------------	----------	-------------------------	----------	-------------------------	----------

Please refer to COMPARATIVE TABLES in the Courts to which the Journal belongs.

TABLE No. III

Showing serially the pages of the ALL INDIA REPORTER, 1927, PRIVY COUNCIL SECTION with corresponding references of other REPORTS, JOURNALS AND PERIODICALS, including the LAW REPORTS, INDIAN APPEALS AND INDIAN LAW REPORTS.

Column No. 2 denotes corresponding references of other REPORTS, JOURNALS
AND PERIODICALS.

A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals
1	25 A L J 23	18	31 C W N 469	32	54 I A 68	50	29 B L R 791
	99 I C 686		52 M L J 402		25 M L W 621		38 M L T 97
	4 O W N 46		45 C L J 313		1927 M W N 261	52	1927 M W N 96
	31 C W N 390		25 M L W 635		8 P L T 307		31 C W N 533
	52 M L J 373		6 Pat 323		29 B L R 805		101 I C 249
	38 M L T 73		29 B L R 796		31 C W N 670		53 M L J 658
	54 I A 1	20	1927 M W N 41		45 C L J 395	56	52 M L J 472
	54 Cal 161		100 I C 93		39 M L T 224		25 M L W 789
	29 B L R 752		54 I A 48		100 I C 86		25 A L J 319
	45 C L J 279		31 C W N 514	37	25 A L J 80		31 C W N 570
	25 M L W 685		52 M L J 412		38 M L T 48		1927 M W N 352
	8 P L T 173		54 Cal 166		1927 M W N 89		4 O W N 424
2	25 A L J 51		45 C L J 305		4 O W N 184		101 I C 44
	1927 M W N 12		25 M L W 631		100 I C 130		29 B L R 848
	4 O W N 153	22	25 A L J 69		54 I A 79		45 C L J 504
	8 P L T 107		1927 M W N 76		31 C W N 462		8 P L T 462
	38 M L T 33		38 M L T 53		8 P L T 210		51 Bom 450
	99 I C 669		5 Rang 7		49 All 149		54 I A 122
	31 C W N 365		52 M L J 362		52 M L J 720	57	52 M L J 466
	54 I A 33		100 I C 32		45 C L J 336		25 M L W 791
	52 M L J 430		54 I A 23		29 B L R 825		1927 M W N 347
	29 B L R 763		4 O W N 300		26 M L W 856		4 O W N 428
	25 M L W 710		29 B L R 772	41	1927 M W N 95		101 I C 20
	6 Pat 259		45 C L J 268		52 M L J 426		29 B L R 839
	45 C L J 408		31 C W N 625		29 B L R 759		45 C L J 420
8	1927 M W N 21		25 M L W 679		25 M L W 709		31 C W N 649
	4 O W N 80		6 Bur L J 59		45 C L J 404		51 Bom 442
	54 I A 5	25	25 A L J 78		105 I C 469		54 I A 111
	52 M L J 497		1927 M W N 87	42	1927 M W N 149	60	52 M L J 463
	31 C W N 485		38 M L T 46		4 O W N 197		1927 M W N 353
	100 I C 485		4 O W N 181		25 A L J 113		101 I C 50
	1 Luck 583		52 M L J 366		52 M L J 346		29 B L R 844
	45 C L J 282		28 P L R 117		25 M L W 336		31 C W N 744
	25 M L W 751		100 I C 22		100 I C 105		54 Cal 414
15	25 A L J 65		54 I A 52		50 Mad 193		45 C L J 454
	1927 M W N 80		31 C W N 444		54 I A 89		26 M L W 40
	38 M L T 41		45 C L J 297		31 C W N 503		54 I A 118
	5 Rang 18		25 M L W 722		38 M L T 87		39 M L T 221
	52 M L J 376		29 B L R 782		29 B L R 833	62	101 I C 897
	25 M L W 342		8 P L T 377		8 P L T 327	66	4 O W N 463
	28 P L R 109		8 Lah 253		45 C L J 435		101 I C 903
	100 I C 1	26	31 C W N 393	44	31 C W N 271	70	4 O W N 491
	54 I A 61		1927 M W N 68		25 A L J 117		101 I C 17
	45 C L J 263		100 I C 126		1927 M W N 103		31 C W N 857
	31 C W N 621		52 M L J 441		38 M L T 64		25 A L J 687
	8 P L T 280		28 Cr L J 254		4 O W N 283		1927 M W N 500
	6 Bur L J 40		25 M L W 724		8 P L T 155		53 M L J 245
	29 B L R 800		28 P L R 167		100 I C 227		26 M L W 265
17	1927 M W N 147		29 B L R 784		54 I A 96	72	39 M L T 232
	25 M L W 346		45 C L J 418		28 Cr L J 259		1927 M W N 334
	100 I C 91		7 A I Cr R 350</				

Comparative Tables
A. I. R. 1927 Privy Council=Other Journals—(Contd.)

A.I.R.		Other Journals		A.I.R.		Other Journals		A.I.R.		Other Journals		A.I.R.		Other Journals	
73	29	B L R	850	102	39	M L T	161	121	32	C W N	233	151	5	Rang	427
	38	M L T	90		8	Lah	573		9	L L J	496		39	M L T	131
	45	C L J	507		25	A L J	959		39	M L T	345		25	A L J	713
	54	Cal	500		28	P L R	638		101	I C	363		16	C L J	126
	54	I A	129		26	M L W	634		1927	M W N	456		31	C W N	1078
	26	M L W	180		102	I C	670		26	M L W	94		26	M L W	417
	102	I C	17		53	M L J	629		31	C W N	1087		53	M L J	25
	52	M L J	524		39	M L T	544		39	M L T	155		102	I C	610
	4	O W N	482		27	M L W	175		101	I C	873		54	I A	265
	101	I C	79		52	M L J	734		29	B L R	961		25	A L J	690
76	29	B L R	856	108	29	B L R	882	128	1927	M W N	448	156	29	B L R	1027
	50	Mad	421		31	C W N	741		54	I A	238		45	C L J	633
	25	A L J	593		101	I C	442		25	A L J	681		1927	M W N	520
	45	C L J	512		45	C L J	544		45	C L J	605		4	O W N	676
	31	C W N	799		54	I A	190		53	M L J	123		5	Rang	451
	1927	M W N	502		25	A L J	621		26	M L W	85		31	C W N	993
	54	I A	186		1927	M W N	485		31	C W N	1063		39	M L T	72
	26	M L W	139		54	Cal	595		54	Cal	770		26	M L W	720
	8	P L T	681		39	M L T	5		101	I C	545		53	M L J	30
	25	A L J	314		26	M L W	268		131	29	B L R		955	159	102
80	1927	M W N	381	110	31	C W N	495	50		Mad	497	54	I A		289
	101	I C	29		4	O W N	515	54		I A	228	25	A L J		628
	31	C W N	693		2	Luck	93	45		C L J	613	29	B L R		1136
	4	O W N	523		54	I A	126	1927		M W N	507	31	C W N		943
	8	P L T	480		102	I C	889	25		A L J	697	1927	M W N		513
	26	M L W	147		26	M L W	70	31		C W N	1021	4	O W N		650
	1927	M W N	393		1927	M W N	519	53		M L J	196	46	C L J		136
	101	I C	1		101	I C	377	39		M L T	45	39	M L T		1
	31	C W N	717		1927	M W N	433	26		M L W	829	8	P L T		623
	45	C L J	520		31	C W N	890	135	1927	M W N	459	54	Cal	955	
84	6	Pat	481	113	39	M L T	270		102	I C	198	162	27	M L W	119
	8	P L T	497		53	M L J	592		54	I A	218		29	B L R	1179
	54	I A	156		52	M L J	658		29	B L R	1143		46	C L J	57
	25	A L J	905		101	I C	363		46	C L J	1		53	M L J	114
	53	M L J	576		29	B L R	877		31	C W N	965		1927	M W N	517
	26	M L W	754		49	All	367		53	M L J	158		31	C W N	1002
	52	M L J	655		31	C W N	853		54	Cal	669		39	M L T	50
	1927	M W N	340		1927	M W N	444		8	P L T	663		104	I C	1
	101	I C	38		4	O W N	543		26	A L J	1		26	M L W	717
	29	B L R	868		54	I A	204	139	26	M L W	848	164	53	M L J	18
89	31	C W N	646	116	25	A L J	617		101	I C	779		29	B L R	1150
	38	M L T	95		26	M L W	326		29	B L R	969		46	C L J	9
	54	I A	152		39	M L T	166		1927	M W N	467		31	C W N	1027
	54	Cal	508		101	I C	353		50	Mad	508		39	M L T	61
	26	M L W	435		31	C W N	700		54	I A	248		104	I C	476
	25	A L J	956		1927	M W N	465		45	C L J	620		54	I A	427
	46	C L J	341		25	A L J	625		31	C W N	910		21	S L R	101
	52	M L J	579		39	M L T	8		53	M L J	57		55	Cal	126
	29	B L R	863		26	M L W	176		4	O W N	621	165	1	L C	167
	101	I C	411		53	M L J	509	39	M L T	52	53		M L J	1	
97	31	C W N	830	117	8	P L T	255	26	M L W	186	29		B L R	1154	
	4	O W N	517		101	I C	359	25	A L J	945	46		C L J	13	
	5	Rang	283		1927	M W N	437	8	P L T	719	1927		M W N	534	
	1927	M W N	489		54	I A	196	146	101	I C	736		31	C W N	1053
	54	I A	145		31	C W N	885		53	M L J	22		103	I C	386
	26	M L W	429		53	M L J	117		1927	M W N	442		54	I A	301
	25	A L J	918		54	Cal	586		54	I A	272		26	A L J	7
	46	C L J	344		39	M L T	170		29	B L R	1014		26	M L W	619
	9	P L T	21		26	M L W	642		1	L C	192		39	M L T	618
	101	I C	426	121	52	M L J	729		5	Rang	422		2	Luck	316
	4	O W N	531		101	I C	373		46	C L J	123	172	29	B L R	953
101	1927	M W N	480		29	B L R	836		39	M L T	144		45	C L J	589
	26	M L W	82		25	A L J	599		32	C W N	1		1927	M W N	436
	31	C W N	972		45	C L J	548		26	M L W	751		54	Cal	582
	53	M L J	507		1927	M W N	463	148	103	I C	239		54	I A	187
	52	M L J	663		4	O W N	537		39	M L T	105		31	C W N	950
	101	I C	355		54	I A	211		102	I C	639		53	M L J	99
	29	B L R	870		28	P L R	463		54	I A	276		39	M L T	63
	31	C W N	677		8	P L T	647		29	B L R	1017		103	I C	366
	1927	M W N	481		26	M L W	442		53	M L J	71		4	O W N	735
	54	I A	178		8	Lah	597		1927	M W N	492		26	M L W	892

A.I.R.		Other Journals		A.I.R.		Other Journals		A.I.R.		Other Journals		A.I.R.		Other Journals	
173	4	O W N	737	206	104	I C	337	229	106	I C	488	246	47	C L J	7
	104	I C	113		1927	M W N	713	230	46	C L J	272		53	M L J	786
	17	C L J	258		29	B L R	1400		53	M L J	392		1928	M W N	1
176	25	A L J	641	208	46	C L J	237		1927	M W N	778		4	O W N	1192
	29	B L R	1227		53	M L J	325		4	O W N	935		32	C W N	257
	46	C L J	76		104	I C	92		29	B L R	1392		30	B L R	64
	53	M L J	81		1927	M W N	706		32	C W N	119		27	M L W	208
	1927	M W N	561		32	C W N	170		28	P L R	567		107	I C	4
	1	L C	291	210	1927	M W N	600		105	I C	220	248	26	A L J	28
	104	I C	257		46	C L J	214	234	54	I A	403		54	M L J	43
	54	I A	338		104	I C	139		5	Rang	841		27	M L W	7
	51	Bom	725		29	B L R	1367		46	C L J	406		4	O W N	1205
	32	C W N	61		32	C W N	145		32	C W N	173		30	B L R	110
	26	M L W	809		53	M L J	278		39	M L T	492		47	C L J	101
185	104	I C	327		39	M L T	294		6	Bur L J	231		106	I C	534
	4	O W N	759	215	8	Lah	230		106	I C	17		32	C W N	305
	54	M L J	388		54	I A	45		53	M L J	425		1928	M W N	103
188	104	I C	332	217	54	I A	380	237	5	Rang	852	250	54	I A	432
191	53	M L J	166		51	Bom	830		29	B L R	1481		26	A L J	19
	1927	M W N	581		29	B L R	1484		46	C L J	349		8	P L T	813
	4	O W N	705		46	C L J	393		32	C W N	28		32	C W N	260
	29	B L R	1289		39	M L T	527		105	I C	788		47	C L J	90
	46	C L J	188		105	I C	694		4	O W N	926		106	I C	571
	103	I C	518		53	M L J	475		53	M L J	388		54	M L J	293
	31	C W N	1092	224	54	I A	413	238	54	I A	359	252	27	M L W	1
	54	I A	372		29	B L R	1496		51	Bom	957		1928	M W N	20
	26	A L J	22		46	C L J	413		26	A L J	32		4	O W N	1231
	26	M L W	710		32	C W N	203		29	B L R	1503		54	M L J	88
	8	P L T	699		39	M L T	521		46	C L J	420		47	C L J	136
	29	P L R	1		105	I C	703		39	M L T	463		32	C W N	281
195	53	M L J	42		27	M L W	198		106	I C	1		30	B L R	

THE ALL INDIA REPORTER

1927 PRIVY COUNCIL

L. R. I. A. ALPHABETICAL INDEX

of Cases reported in

L. R. 54 INDIAN APPEALS

WITH REFERENCES TO THE PAGES OF

The All India Reporter

[48 Cases]

Names of Parties			L. R. I. A. pp	A. I. R. pp
Abadi Begum v. Kaniz Zainab	...	...	33	1927 PC 2
Abdul Rahman v. King-Emperor	...	...	96	" " 44
Balla Mal v. Ata Ullah Khan	...	...	372	1927 PC 191
Banku Behari Chatterji v. Naraindas Dutt	...	...	129	" " 73
Basiram Saha Roy v. Ram Ratan Roy	...	...	196	" " 117
Bhagechand Dagadusa v. Secretary of State	...	...	338	" " 176
Chattra Kumari Devi v. W. W. Broucke	...	...	432	1927 PC 250
Delhi Cloth & General Mills Co. Ltd. v. Income-tax Commissioner	...	...	421	1927 PC 242
Dhanna Mal v. Moti Sagar	...	...	178	" " 102
Fitzolmes v. Bank of Upper India	...	...	52	1927 PC 25
Gangi Reddi v. Tami Reddi	...	...	136	1927 PC 80
Indar Prasad v. Jagmohan Das	...	...	301	1927 PC 165
Jagannath Prosad Singh Chowdhary v. Surajmal Jalal	...	...	1	1927 PC 1
Kala Chand Banerjee v. Jagannath Marwari	...	...	190	1927 PC 108
Kalyanasundaram Pillai v. Karuppa Mooppanar	...	...	89	" " 42
Keshoram Poddar v. Nundo Lal Mallick	...	...	152	" " 97
Krishnamurthi Ayyar v. Krishnamurthi Ayyar	...	...	248	" " 139
Krishn Das v. Nathu Ram	...	...	79	" " 37
Krishnendra Nath Sarkar v. Kusum Kamini Debi	...	...	48	" " 20
Laxmanrao Madhavrao v. Shriniwas Lingo	...	...	380	1927 PC 217
Lingangowda v. Basangowda	...	...	122	" " 56

Names of Parties	L. R. I. A. pp.	A. I. R.	pp.
Maharaja of Dumraon v. Secretary of State ...	156	1927 PC	89
Ma Hnit v. Fatima Bibi ...	145	" "	99
Ma Mi v. Kallander Ammal (No. 1) ...	23	" "	22
Ma Mi v. Kallander Ammal (No. 2) ...	61	" "	15
Maung Po Nyun v. Ma Saw Tin ...	403	" "	234
Maung Sin v. Ma Tok... ...	272	" "	146
Mukand Singh v. King-Emperor ...	45	" "	215
Mukund Dharman Bhoir v. Balkrishna Padmanji ...	413	" "	224
Nand Rani Kunwar v. Indar Kunwar ...	5	1927 PC	8
Narayan Das Khettry v. Jatindra Nath Roy Chowdhry ...	218	" "	135
Niamat Rai v. Din Dayal ...	211	" "	121
Protap Chandra Deo v. Jagadish Chandra Deo ...	289	1927 PC	159
Radha Binodo Mandal v. Gopal Jiu Thakur ...	238	1927 PC	128
Raghunath Prasad Singh v. Deputy Commissioner of Partabgarh ...	126	" "	110
Ramarayaningar, Panaganti v. Maharaja of Venkatagiri ...	68	" "	32
Ramgouda Annagouda v. Bhausahab ...	396	" "	227
Ramsaran Mandar v. Mahabir Sahu ...	55	" "	18
Salleh Mahomed Umar Dossal v. Nathoomal Kessamal ...	427	1927 PC	164
Sassoon, M. A. & Sons, Ltd. v. International Banking Corporation ...	317	" "	195
Secretary of State v. Girjabai ...	359	" "	238
Secretary of State v. Tarak Chandra Sadhukhan ...	187	" "	172
Shankar v. Narsimha ...	111	" "	57
Sheobaran Singh v. Kulsum-un-nissa ...	204	" "	113
Sonaton Pal v. Galstaun ...	118	" "	60
Soniram Jeetmull v. R. D. Tata & Co. ...	265	" "	156
Vertannes v. Robinson ...	276	1927 PC	151
Vibhudapriya Thirtha Swamiar v. Lakshmindra Thirtha Swamiar ...	228	" "	131

LIST OF OVERRULED CASES

1927 PRIVY COUNCIL

Daulat v. Sankatha Prasad, 47 All. 355 Overruled in A. I. R. 1927 P. C. 37.
 A. I. R. 1925 All. 324 (2)=86
 I. C. 91.

Naginlal v. Official Assignee, (1912) 37 Bom. 243=14 Bom. L. R. 1148=17 I. C. 876. A. I. R. 1927 P. C. 176.

Secy. of State v. Gajanan Krishna Rao, (1911) 35 Bom. 362=13 Bom. L. R. 273=10 I. C. 639. A. I. R. 1927 P. C. 176.

Secy. of State v. Gulam Rasul, (1916) 40 Bom. 392=18 Bom. L. R. 243 ... =34 I. C. 535. A. I. R. 1927 P. C. 176.

THE
ALL INDIA REPORTER
1927

PRIVY COUNCIL

* * A. I. R. 1927 Privy Council 1

(*From Calcutta*)

19th October 1926

LORDS PHILLIMORE, SINHA AND BLANES-
BURGH AND MR. AMEER ALI

Jagannath Prosad Singh Chowdhury—
Appellant.

v.

Surajmul Jalal and others—Respon-
dents.

Privy Council Appeal No. 108 of 1925,
Calcutta Appeal No. 6 of 1924.

* * (a) *Civil P. C., O. 34 and S. 34—Mort-
gage suit—Question of interest is determined by
O. 34 and not by S. 34.*

In the case of mortgages the question as to
rate of interest is to be determined under O. 34
and not S. 34. [P 1, C 2]

* * (b) *Civil P. C., O. 34—Till expiration of
period of redemption contract rate of interest
will be allowed—Six months' period of redemp-
tion will be counted from the date of appellate
decree where the first Court's decree is varied.*

Till the period for redemption has expired,
the matter remains in contract and the interest
has to be paid at the rate and with the rests
specified in the contract of mortgage; but after
the period of redemption has expired the matter
passes from the domain of contract to that of
judgment, and the right of the mortgagee should
thenceforth depend, not on the contents of his
bond, but on the directions in the decree: 34 I.A.
9=34 Cal. 150 (P.C.), *Foll.*

It might be that the period of six months allow-
ed for redemption will be counted from the date
of trial Court's decree, if the decree and judg-
ment of the Court of first instance was one which
was affirmed in appeal; but where the decree is
varied in appeal, the six months should be count-
ed from the date of the appellate decree. *A. I. R.*
1924 P. C. 60 explained and held not to be an
authority for the proposition that interest should
be allowed at the contract rate only up to the
date of the trial Court's decree. [P 2, C 1]

1927 K/1

G. R. Lowndes and B. Dube—for Ap-
pellant.

A. M. Dunne and H. N. Sen—for Res-
pondents.

Lord Phillimore.—On this appeal as
it was lodged various points were pre-
sented which have not been insisted
upon in argument before their Lordships'
Board. The one matter to which counsel
for the appellant have confined them-
selves is the question of the rate of inter-
est and whether it should be simple or
compound from the date either of the
decree of the High Court or, as put by
one of the learned counsel, the decree of
the Court of first instance.

Really this matter is determined
beyond question by O. 34 of the Code of
Civil Procedure. This may, for this
particular case of mortgages, differ from
the general provision of S. 34 of the
Code; but if so, the particular avoids the
general. Under R. 2 of that order it is
provided:

In a suit for foreclosure, if the plaintiff
succeeds, the Court shall pass a decree (a) order-
ing that an account be taken of what will be due
to the plaintiff for principal and interest on the
mortgage, and for his costs of the suit (if any)
awarded to him on the day next hereinafter
referred to . . . and directing (c) that if the
defendant pays into Court the amount so due
on a day within six months from the date of
declaring in Court the amount so due to be fixed
by the Court, the plaintiff shall deliver up to the
defendant, or to such person as he appoints, all
documents in his possession . . . but (d) that,
if such payment is not made on or before the
day to be fixed by the Court, the defendant shall
be debarred from all right to redeem the property.

And R. 4, sub-R. 1, provides that in a
suit for sale, if the plaintiff succeeds, the
Court shall pass a decree as mentioned
and then direct that the property shall
be sold if it is not redeemed.

That is very well paraphrased by Lord Davey in delivering the judgment of the Board in the case of *Rani Sundar Koer v. Rai Sham Krishen* (1). At page 21 he says :

Their Lordships have no hesitation in expressing their concurrence with the High Court of Calcutta, not only in allowing interest after the fixed day, but also in allowing interest at the Court rate and not at the mortgage rate. They think that the scheme and intention of the Transfer of Property Act was that a general account should be taken once for all, and an aggregate amount be stated in the decree for principal, interest and costs due on a fixed day, and that after the expiration of that day, if the property should not be redeemed, the matter should pass from the domain of contract to that of judgment, and the rights of the mortgagee should thenceforth depend, not on the contents of his bond, but on the directions in the decree.

Up to this point, till the period for redemption has expired, the matter remains in contract and the interest has to be paid at the rate and with the rests specified in the contract of mortgage. That is the judgment which the High Court has delivered and of which complaint is, in their Lordships' opinion, ineffectually made.

A point was taken that the date when the contract rate expired should be six months from the date of the original decree of the Subordinate Judge, and not six months from the date of the decree of the High Court. Their Lordships think that cannot be so. It might be so if the decree and judgment of the Court of first instance was one which was affirmed but, inasmuch as it was varied because the sum fixed for redemption was incorrectly calculated, it is impossible for the appellant in whose favour that incorrect judgment was given, to rely upon that date as the date from which the redemption period should be calculated.

Their Lordships therefore are of opinion that the decision of the High Court is in all respects correct; but their Lordships must deal with a point which has been made by counsel for the appellant upon the decision of this Board in the case of *Ragunath Prasad v. Sarju Prasad* (2). No doubt in that case their Lordships finished their judgment, which was a judgment in favour of the respondents, who had not been called upon, by saying :

Their Lordships are of opinion that the decree of the High Court should be varied by allowing compound interest on the principal at the rate

of 2 per cent. per mensem from the date of the execution of the bond until September 25, 1917; which was the date of the decree of the Court of first instance, not of the redemption period—and thereafter simple interest at the rate of 6 per cent. per annum up to the date of realization, and that in other respects the decree of the High Court should be affirmed.

This part of the decision does not apparently square with either the order or the language of this Board in the case of *Rani Sundar Koer v. Rai Sham Krishen* (1). The explanation must be that, for some reason or other, their Lordships thought that the respondents, who were doing very well, were prepared to leave this particular matter in their Lordships' hands. If the respondents, when their counsel received the print of the judgment, had been so minded as to come to the Board and say that this had passed per incuriam they would have been heard and the matter would have been fully discussed.

Their Lordships cannot have thought that they were deciding adversely to the respondents or they would have called upon their counsel to argue. What exactly influenced their Lordships at this moment of time can only be conjectured; but for some reason or other they must have thought that the respondents consented to leave this matter in their hands, and the case is not to be relied upon as an authority in this particular.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for Appellant—*Watkins and Hunter.*

Solicitors for Respondents—*Barrow Rogers and Nevill.*

* * A. I. R. 1927 Privy Council 2

(From Patna ON APPEAL from A. I. R. 1924 Patna 284)

1st November 1926

LORDS ATKINSON AND CARSON AND SIR JOHN WALLIS

Mt. Abadi Begum and others—Appellants.

v.

Mt. Bibi Kaniz Zainab and others—Respondents.

Privy Council Appeal No. 26 of 1926
Patna Appeal No. 16 of 1923.

(1) [1907] 34 I. A. 9=34 Cal. 150=5 C. L. J. 106=11 C. W. N. 249 (P. C.).
A. I. R. 1924 P. C. 60=3 Pat. 270.

**** (a) Mahomedan Law—Waqf—Shiah Law**
—Gift must be perpetual and unconditional—
Settlor must give up possession and must not be at
out of the waqf.

The Mahomedan law, which only allows a testator restricted powers of disposition over his property, contains no such restriction as regards gifts inter vivos, but does not recognize such gifts as valid unless possession is given to the donee. This also applies to waqfs or gifts for religious or charitable purposes, at any rate among Shiahs. Further, in the case of waqfs or gifts for charitable purposes, the Shiah Law imposes a further restriction that the wakf or settlor shall not retain for himself any interest in the subject of the gift. This restriction, for which reasons of a religious character are assigned, undoubtedly operates as a check on the creation of wakfs not from purely religious motives, but with a view of defeating the rights of heirs and transmitting the possession and control of the settlor's property after his death to other persons in the character of mutawallis. This restriction is the last of the four conditions as to the validity of wakfs laid down in the *Suraya*, the leading Shiah authority, as follows: "(1) It must be perpetual; (2) absolute and unconditional; (3) possession must be given of the mowkoof of the thing appropriated; (4) it must be entirely taken out of the wakf or appropriator himself. The wakf must not eat out of the wakf. [P 4 C 2, P 5 C 1]

Where the settlor, under colour of fixing her salary as mutawalli, was really reserving for her lifetime a portion of the income or usufruct of the property far in excess of what was assigned in the deeds to future mutawallis or could reasonably have been assigned to them.

Held: that it was a clear violation of the condition: 4 N. W. P. 155 *held as not good law.* [P 5 C 2, P 6 C 1]

It is an entire departure from the principle that it is a condition of the validity of the wakf that the wakf should not reserve any interest in the endowed property for himself; to hold that where the wakf reserves a portion of the income for himself the wakf only fails as to property sufficient to produce the reserved income and is good as to the rest.

The rule that the settlor when mutawalli can take the salary fixed for mutawallis generally is really no exception; for in that case he takes in his capacity as mutawalli and not in his capacity as settlor. [P 6 C 1 & 2]

*** (b) Mahomedan Law—Waqf—Settlor appointing himself mutawalli—Mutation of names is the usual means of divesting of possession.**

Where the settlor appoints himself as mutawalli, the obvious and ordinary means of showing the change in the character of her possession is by mutation of names in the public registry as holding as mutawalli: 4 N. W. P. 155 and 24 All. 257, *Ref.* [P 7, C 2]

W. Wallach—for Appellants.

L. de Gruyther and *B. Dube*—for Respondents.

Sir John Wallis.—This is an appeal from the judgment of the High Court of Patna reversing the decision of the Subordinate Judge, and giving the 1st

plaintiff, Mt. Bibi Kaniz Zainab (hereinafter referred to as the plaintiff), and the other plaintiffs her assigns a decree as sole heiress of one Mt. Asmatunissa, who died in 1910, for possession of certain lands in respect of which that lady during her lifetime had executed three wakfnamas dated the 15th February 1882, the 7th December 1897 and 17th July 1907, dedicating them to religious and charitable uses, and providing for the appointment of mutawallis. Before coming to the points on which the lower Courts have differed, it may be mentioned that the plaintiff also attacked these transactions unsuccessfully on the ground that they were brought about by fraud without the knowledge of the settlor, who was incapable of understanding them, and also on the ground that the wakfnamas were merely nominal transactions, but there are concurrent findings of both Courts against the plaintiff on these issues, and they have not been questioned before their Lordships.

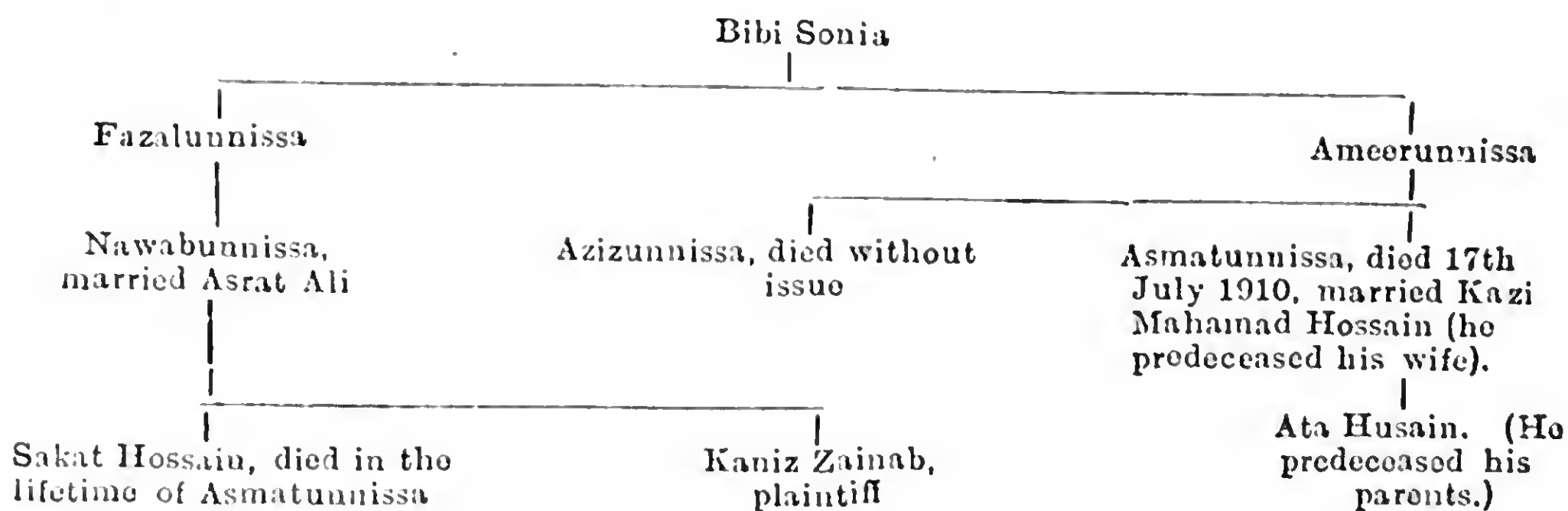
On this appeal it has been contended for the appellants that the Subordinate Judge was right in holding that the plaintiff has not established her right to sue as heiress of the deceased, and in rejecting the plaintiff's contention that the wakfs were invalid because the endowed lands had remained all along in the possession of the settlor as owner. For the respondents it was contended that the High Court was right in differing from these findings, and it was also argued that the wakfnamas were bad on the face of them, as they did not sufficiently divest the settlor of all interest in the endowed properties in accordance with the requirements of the Shiah Law. This contention was not specifically pleaded, but was raised in the general allegation in the eleventh paragraph of the plaint, that the wakf was not valid under the British and Mahomedan Law, and was covered by the concluding portion of the sixth issue.

Their Lordships will deal, in the first place, with the question of heirships and give their reasons for agreeing with the finding of the High Court that it is sufficiently proved. The following genealogical table (*vide* page 4) shows how the plaintiff traces her descent from Bibi Sonia, the grandmother of the deceased.

The defendants, in answer to the averment in paragraph 2 of the plaint that the plaintiff was the daughter of Nawabunnissa, uterine sister of the deceased, pleaded in paragraph 5 of their written statement, that it was not at all true that the plaintiff was the daughter of the deceased's sister and again in paragraph 7 that the deceased had no sister of her own named Mt. Nawabunnissa.

She had only one sister named Axizunnissa, whose name is mentioned in all the deeds of wakf.

the oral and documentary evidence and came to the conclusion that the plaintiff's heirship was sufficiently established by the oral and documentary evidence in the case and proceeded.) Before dealing with the plaintiff's right to recover the properties included in the wakfnamas executed by the deceased, it will be convenient to refer to the law governing the question. The Mahomedan Law, which only allows a testator restricted powers of disposition over his property, contains no such restriction as



At the trial, however, they went further and set up that the plaintiff was not the daughter of Nawabunnissa, but was the daughter of Nawabunnissa's husband by another of his wives, Amnan Bibi. This further development may possibly have been due to the fact that the documents produced by the plaintiff clearly established that Nawabunnissa was the daughter either of the deceased's mother Fazalunnissa or of her sister Ameerunnissa, and that in either case the plaintiff as Nawabunnissa's daughter would be entitled to succeed in default of nearer heirs. However this may be, their Lordships are of opinion that in coming to the conclusion that the plaintiff had failed to prove that she was the daughter of Nawabunnissa, the Subordinate Judge failed to attach due weight to this aspect of the case. If the plaintiff was the daughter of Amnan Bibi, the evidence suggests that that fact must have been known to the defendants from the first, and that, if not, they could easily have ascertained and pleaded it. Their Lordships agree with Das, J., who delivered the judgment of the High Court, that the fact that they failed to do so greatly impairs the effect of the purely oral evidence by which they sought to prove this part of their case. (Their Lordships discussed in brief

regards gifts inter vivos, but does not recognize such gifts as valid unless possession is given to the donee. This also applies to wakfs or gifts for religious or charitable purposes, at any rate among Shiahs. Further, in the case of wakfs or gifts for charitable purposes, the Shiah law imposes a further restriction that the wakf or settlor shall not retain for himself any interest in the subject of the gift. This restriction, for which reasons of a religious character are assigned, undoubtedly operates as a check on the creation of wakfs not from purely religious motives, but with a view of defeating the rights of heirs and transmitting the possession and control of the settlor's property after his death to other persons in the character of mutawallis. It is not immaterial to note in this connexion that deeds now in question confer the office of mutawalli on the brothers of the settlor's deceased husband and make provision for the office remaining in their families. This restriction is the last of the four conditions as to the validity of wakfs laid down in the Suraya, the leading Shiah authority, as follows :

(1) It must be perpetual ; (2) absolute and unconditional ; (3) possession must be given of the *mowkoo* of the thing appropriated, and (4) it must be entirely taken out of the wakf or appropriator.

himself" (Baillie, "Digest of Pt. II," p. 218). Elsewhere this last restriction has been expressed in direct and homely language by saying that the wakf must not eat out of the wakf. The law is laid down to the same effect in the other authorities cited textually by Mr. Ameer Ali in his valuable treatise (Vol. I, p. 218, fourth edition).

In the present case the wakfs have been attacked as failing to comply with the third and fourth of the above conditions on the ground that possession was not given and that the wakf, or settlor, did not divest herself of all interest in the subject of the gift. The Subordinate Judge disallowed both these contentions; and the High Court, holding that possession was not shown to have been given, reversed the judgment on that ground and gave the plaintiff a decree, without dealing with the further question whether the wakf was bad for failing to comply with the fourth condition, a contention which would appear not to have been argued, though raised in the grounds of appeal from the lower Court. It has, however, been strenuously argued here, and, as it may be said to arise on the face of the documents themselves and is of general importance, their Lordships will proceed to consider it.

Exhibit G, the principal wakfnama of 15th February 1882, after reciting the desire of the settlor to make a wakf of the properties specified in the deed for reward in the next world and for the maintenance of the mosque and the imambara constructed by her late husband, for the support of fakirs and travellers and for the annual Fataha of herself and her husband, goes on to provide as follows :

1. I make wakf absolutely of the properties mentioned below in the name of God without any condition valid or invalid. I, the declarant, or my heirs and representatives have not and shall not have, from this day, any personal connexion with or any rights in future to the endowed property.

2. For carrying out the objects of the Wakf, I, the declarant, shall remain mutwalli of the endowed property during my lifetime and I have got the power to appoint a mutawalli who will manage the wakf property after my death. If I, the executant, before my death fail to execute any Tawliat in contravention of the arrangement now made, then the arrangement made under this deed shall remain intact and in force.

3. I, the executant, shall during my lifetime receive a monthly salary of Rs. 125 of the Company's coin in the capacity of a mutawalli. The remaining income of the wakf property shall, after the payment of the Government revenue,

other demands and the collection expenses, be applied to the expenses of the mosque and imambara. An account of income and expenditure shall be kept in the Khankah and it shall be signed and sealed daily by the mutwali of the mosque for the time being. The proof, i.e., voucher or the said account shall be kept and it shall be kept in a book and not in a separate piece of paper.

The document further provides that on her death there should be two mutawallis, one for the mosque, the other for the imambara, and they should each receive a salary of Rs. 15 a month. The result was that the settlor received herself a salary as mutawalli of Rs. 1,500 a year for life out of the income of the wakf properties, valued in the deed at Rs. 19,000, and that after her death each mutawalli was to receive Rs. 180 a year, or Rs. 360 in all. For the respondents it was contended before the Subordinate Judge that this reservation rendered the wakf invalid, citing Mr. Tyabji's "Principles of Mahomedan Law" (1913) and Mr. Ameer Ali's well-known work. On this the Subordinate Judge observed, quite truly, that it did not follow that the wakf or settlor could not, when he was himself to be mutawalli, reserve any benefit out of the wakf properties for his benefit as mutawalli. On the contrary, he correctly stated, it appears that the wakf can lawfully take the allowance found for the mutawalli generally when he himself holds the office. This is in accordance with what is laid down in the texts cited in Mr. Ameer Ali's book in this connexion. Instead, however, of adverting to the fact that in this wakf he takes, not the salary fixed for the mutawalli generally, but the bulk of the income, the Subordinate Judge goes on :

I should observe that the allowance fixed for herself by the mutawalli in this case did not only not consume the whole of the income, but left a sufficient margin for the religious and charitable uses, and thus the fixing of the allowance did not negative the object of the wakf, and was not, hence, illegal, as it was only for the lifetime of the wakf as mutawalli.

These observations appear to be based on a misconception, as the condition is that the wakf shall not retain any benefit for himself, and the fact that he leaves enough for the performance of the charities appears to their Lordships to be immaterial.

It seems clear in the present case that the settlor, under colour of fixing her salary as mutawalli, was really reserving for her lifetime a portion of the income

or usufruct of the property far in excess of what was assigned in the deed to future mutawallis or could reasonably have been assigned to them. It was therefore in their Lordships' opinion a clear violation of the condition.

Assuming that this is so, it has been further contended before their Lordships that the only result is that the wakf fails as to the reserved Rs. 1,500, and must be supported as to the rest of the income on the authority of *Hajee Kalub Hossein v. Mt. Mehram Beebee* (1), where it was held, a wakf in which the wakif had reserved to himself two-thirds of the income of the wakf properties for life failed only as to these two-thirds, but could be supported as to the remaining third, which, under the terms of the deed was to be devoted from the first to religious uses. It appears to their Lordships that this ruling is not in accordance with what is stated to be "the more approved opinion" in the *Suraya*, on which the learned Judges rely (Baillie, Part II, pp. 218, 219), or with the other authorities cited textually by Mr. Ameer Ali. As observed by that learned author, the following extract from the *Jam 'aa-ush-Shittat*, dealing with a case where the wakif reserved the whole income to himself for life, throws considerable light on this subject :

A. This wakf is void ab initio, for the wakif reserved to himself during his lifetime the profits of the property. It is one of the conditions for the legality of a wakf that the wakif should take out the subject of the wakf from himself. Therefore, when a wakf is made on his own nafs (self) it is batil (void), though there are others mentioned after himself as the beneficiaries thereof. With reference to the voidableness of the wakf as to himself there is consensus; as regards the voidableness of the remainder, the general opinion is that it is so; for the argument in support of the validity of the wakf in favour of the others are weak.

With this last observation their Lordships are disposed to agree. It is an entire departure from the principle that it is a condition of the validity of the wakf that the wakif should not reserve any interest in the endowed property for sufficient to produce the reserved income reserves a portion of the income for himself the wakf only fails as to property sufficient to produce the reserved income and is good as to the rest.

The rule that the settlor when mutawalli can take the salary fixed for mutawallis generally is really no excep-

tion: for in that case he takes in his capacity as mutawalli and not his capacity as settlor, just as it is laid down a little further on (Baillie, Pt. II, p. 218):

But if one should make an appropriation for the poor and should himself become poor or for lawyers and himself become a lawyer, there is no objection to his participating in its benefits—

that is to say, as a poor man or a lawyer, not as a settlor. There is, in fact, in all these cases no reservation at all.

As regards this part of the case, their Lordships are disposed to agree with the reasoning in the extract from the *Jam 'aa-ush-Shittat* set out above, and are not prepared, as at present advised to hold on the authority of the decision in *Hajee Kalub Hossein v. Mt. Mehram Beebee* (1) that a wakf in which the wakif reserves the bulk of the income for herself as mutawalli during her own lifetime whilst fixing a modest salary for the mutawallis who succeed her can be held valid even to the extent of the unreserved income. As regards the supplementary deed of wakf of 7th December, 1897, Ex. D., in which the settlor included her remaining lands stated to be worth Rs. 1,500 and cancelled the salary she had fixed for herself for life in the former deed, adding "that is I have given up the salary and included it in the wakf" their Lordships are of opinion that if the deed had stopped there it might possibly have been treated as a fresh dedication of all the properties free from any reservation in her own favour; but after reciting her intention to go for Haj and to make Zearut (visit sacred places), the deed provides, S. 17:

That the said manager shall from time to time send money for expenses from the income of the wakf estate to me either at Mecca or to the place to which I shall direct him to send.

This, in their Lordships' opinion, amounts to a clear reservation of the right of the wakif to draw money for the expenses of her pilgrimage to Mecca and to other non-wakf purposes, and therefore, also, to involve a breach of the fourth condition. The last deed of 1907 need not be considered as it was necessitated by the death of the mutawallis, previously appointed to succeed the settlor in the office, and merely appoints other members of her husband's family in their place.

Their Lordships, as at present advised, are disposed to hold that the two principal wakfnamas were wholly invalid by

reason of the reservations in the wakf's favour; but they do not propose to base their advice to His Majesty on this ground as to which they have not had the assistance of the High Court, because on a careful examination of the evidence, they have come to the conclusion that the learned Judges of the High Court were right in holding that the defendants have failed to prove that possession of the wakf properties was ever given so as to comply with the third of the conditions set out above, and the defendants' appeal must fail on this ground.

What the very unusual terms of these wakfnamas suggest is that her husband's relations desired that this lady's property should pass to them on her death as hereditary mutawallis of the wakfs instead of to the legal heirs, and that she was willing to comply with their wishes so long as her own enjoyment was not seriously impaired. The balance left for religious and charitable purposes under the first deed probably did not differ very much from the expenditure previously incurred by her husband and herself for these purposes, and the surrender of her salary and the inclusion of all her remaining lands in the second deed leaving nothing for herself or her heirs was counterbalanced by the provision allowing her to draw freely on the income. That she did so and, indeed, made little or no distinction between the wakf moneys and her own may be gathered from the fact that, according to the findings of both the lower Courts, the defendants have suppressed her accounts and put forward forged accounts in their place. In view of her determination to retain the income for herself during her lifetime, she may well have been reluctant to take the final step of parting with her possession as owner. On the other hand, it was clearly in the interests of her husband's relations and of her agent Imam Ali, in view of the annuity settled upon him and his heirs, to get her to do so in the clearest possible manner, and their failure to effect more than they did would appear to be attributable to her unwillingness rather than to any want of effort of theirs.

It was, of course, impossible for the settlor to hand over possession as malik or owner to herself as mutawalli or trustee of the endowment, but it

was none the less incumbent on her to give such possession as the case admitted. Now the obvious and ordinary means of showing the change in the character of her possession would have been by mutation of names, that is to say, by getting herself entered in the public registry as holding as mutawalli. That was the course adopted and held sufficient in *Hajee Kalub Hossein v. Mt. Mehrum Beebee* (1) and in *Hamid Ali v. Mujawar Husain Khan* (2), the Court observed that if the wakf in that case had been sincere in his desire to divest himself of his property, he would at once have obtained mutation of names, and held in the absence of such mutation that possession had not been surrendered.

In the present case it is significant that between 1882 and 1907 there was no mutation of names except as to one item consisting of a share in certain lands, as to which an additional share was purchased for her in 1883, and both shares were then registered in her name as mutawalli. This isolated instance may well have been brought about without her knowledge by her husband's brother and her agent Imam Ali, who both witnessed the sale deed, and were both interested as already stated in getting the wakfs perfected by delivery of possession. It is much more significant that they did not obtain any mutation of names as to the other numerous items; and in 1907, when the public record of rights for this area was prepared by the revenue authorities, after the fullest notice and inquiry, the settlor was again registered as regards all the other items as malik or full owner, which would not have been done if it had been brought to the notice of the authorities that she was in possession as mutawalli. In these circumstances the belated registration in the same year of some five items out of more than thirty, which may well have been effected without her knowledge by her husband's brother and Imam Ali under a general power of attorney given to them after the execution of the third wakfnama, is entitled to very little weight as evidence that there was ever any change in the character of her possession.

The defence also relied on certain kabuliats or rental agreements taken

(2) [1902] 24 All. 257=(1902) A. W. N. 51.

8 Privy Council **MT. NAND RANI KUNWAR v. MT. INDAR (Mr. Ameer Ali) 1927**

from tenants in which she is described as mutawali, but, as has been pointed out to their Lordships, no corresponding pattas granted by her to the tenants in which she is so described have been put in evidence. On the other hand, in one patta, Ex. A. of 27th November 1898, the original patta has the word "mutawalli" struck out and the word "malik" or owner substituted; and that this was done at the time appears clearly from the fact that in the registration copy of the patta she is described simply as malik and not as mutawalli. This certainly suggests, as Das, J., has observed, that an effort had been made to get the lady to grant the patta as mutawalli and that she had refused to do so; and it is also significant, as Das, J., has pointed out, that not one single document bearing her seal has been produced in which she is described as mutawalli. On the whole their Lordships agree with the conclusion of Das J., who has carefully examined them, that the documents in which she is described as the mutawalli are of a very inconclusive character and may well have been drawn up by her husband's brothers and her agent who were managing her affairs and interested in creating evidence of the surrender of possession.

As regards the oral evidence it is, no doubt, true that the lady incurred expenditure for the purposes mentioned in the wakf, as her husband and she herself had done before any of the wakfs were created; but in view of the suppression of the accounts, it is impossible to say what the amount of that expenditure was, and the natural inference from the suppression is that, if produced, the accounts would not have helped the defendants' case.

On the whole, their Lordships agree with the learned judges of the High Court that possession is not shown to have been given, and are of opinion that the appeal fails on this ground and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for Appellants — *H. S. L. Polak.*

Solicitors for Respondents — *Watkins and Hunter.*

A. I. R. 1927 Privy Council 8

*(From Oudh ON APPEAL from
A. I. R. 1924 Oudh 273)*

1st November 1926

**LORDS PHILLIMORE AND CARSON,
MR. AMEER ALI AND SIR JOHN
WALLIS**

*Mt. Nand Rani Kunwar—Appellant.
v.*

*Mt. Indar Kunwar and others — Res-
pondents.*

Privy Council Appeal No. 46 of 1925.

*Oudh Estates Act (1 of 1869), Ss. 10, 8 List 3
and 22—Lists prepared under S. 8 are conclu-
sive.*

S. 10 provides that the Court shall take judicial notice of the lists and shall regard them as conclusive evidence of the facts they record: 38 All. 552 (P. C.), *Rel. on.*

Where therefore a person's name was entered in list 3.

Held: that in the absence of any evidence to show that his name was wrongly inserted in List 3, his inclusion in that list is conclusive that the sanad he obtained was a primogeniture grant. In other words, that he was a taluqdar taking an estate under a primogeniture sanad under the provisions of the Act, and that the succession to the estate was as provided in S. 22 of the Act. [P 13 C 2]

*L. deGruyther and S. Hyam—for Ap-
pellant.*

*A. M. Dunne and B. Dube — for Res-
pondents.*

Mr. Ameer Ali.—This appeal arises out of a suit brought by the plaintiff Nand Rani Kunwar in the Court of the Subordinate Judge of Lucknow on the 1st April 1921, to establish her title to an estate partly situated in the district of Lucknow and partly in Barabanki in the Province of Oudh.

The plaintiff is the daughter of one Bhagwant Singh, who died on the 9th of December 1871; and she claims the property in suit as devolving on her on the death in 1913 of her mother Mt. Maharani, the widow of Bhagwant Singh. Bhagwant left him surviving a younger brother named Girdhari Singh, Maharani Kunwar, his widow, and two daughters, namely, Birjani and the plaintiff. Birjani died childless in or about 1885.

The plaintiff claims the estate as the sole heiress, on the death of her mother, of her father, Bhagwant Singh, to whom, she alleges, the property belonged at the time of his death.

The first and principal defendant in the action is Indar Kunwar, the widow of Bhagwant Singh's brother, Girdhari Singh, who died on the 6th August 1919. The other defendants are the daughters of Girdhari Singh by his first wife, Raj Kunwar. She died on the 16th June 1920.

The properties in Lists A and B attached to the plaint belonged originally to one Bahadur Singh, who died in or about 1849, leaving two sons, Bhagwant and Girdhari. The latter was an infant of tender years at the time of his father's death, and accordingly Bhagwant became the head of the family and remained in possession of the joint ancestral estate. The properties mentioned in List C are said to have been acquired after Bahadur Singh's death, but no separate argument has been addressed to the Board with regard to them.

The parties are admittedly subject to the law of the Mitakshara, and the two brothers Bhagwant and Girdhari became on the death of their father jointly entitled to the ancestral estate. Matters stood thus with this family when Lord Dalhousie in 1856 "annexed" the kingdom of Oudh, which was followed by a furious revolt. To punish the people, Lord Canning, who had in the meantime succeeded Lord Dalhousie as Governor-General, proclaimed in 1858 a general confiscation of the landed estates in the province. Later, under the Governor-General's Proclamation of March, 1858, the confiscated estates were restored to the proprietors, save and except in cases where they happened to be implicated in the murder of English men and English women; and Bhagwant Singh, as the head of the joint family, received back the properties which form principally the subject-matter of the present suit, and what is called the "Second Summary Settlement" was made with him.

The plaintiff's case, as made in her plaint, is that Kunwar Bahadur Singh and his two sons Bhagwant and Girdhari constituted, from long before the annexation of Oudh, a joint Hindu family governed by the Mitakshara Law, and that when the Summary Settlement was made with Bhagwant Singh, both he and Girdhari became equally entitled to the property for which Bhagwant Singh entered into the agreement with the British Government; that the settlement was

made in Bhagwant Singh's name in his capacity as the head and "trustee" of the joint family; that he obtained in respect of the estate a sanad or grant in his own name in the same capacity; and in 1864 the first Regular Settlement was made with him as such head and "trustee." The plaintiff also sets out in her plaint that in 1867 Girdhari Singh applied to the Court of the Financial Commissioner of Oudh for the partition of his half-share in the joint estate, but instead of an actual separation a settlement was arrived at between the two brothers. The plaintiff, however, does not set out in the plaint the nature of the compromise.

As already stated, Bhagwant died in 1871, and the plaintiff's allegation is that after his death his widow Maharani became entitled to the estate, and that she entrusted its management to Girdhari, and that subsequently, in 1879, she (Maharani Kunwar) relinquished all her claim and title in respect of the said property in favour of Girdhari Singh in consideration of a fixed allowance. The plaintiff's case is that she is not bound under the Hindu Law by the acts of her mother, who was a pardanashin woman.

Her main contentions are based on the following allegations: namely, that Bhagwant Singh by his acts and declarations evinced clearly his intention that he took the estate for the joint family, consisting of himself and his brother Girdhari Singh, and that in 1867, by the arrangement with his brother Girdhari Singh, he became vested with the entire estate in consideration of the annuity fixed for the latter; and, secondly, that the grant by the Government made by the sanad under the Oudh Estates Act (I of 1869), he, Bhagwant Singh, became possessed of the whole property. Her further contention was that by a mistake Bhagwant Singh's name was included in List 3 prepared under the Act, whereas it should have been entered in List 4, and that he never obtained a primogeniture sanad; the sanad that was given to him was in "ordinary" terms.

The contesting defendant, Indar Kunwar, averred, in her written statement, that neither the Summary nor the Regular Settlement was made with Bhagwant Singh in his capacity of the head or trustee of the family; in fact, she strongly repudiated the idea of a trust. She

also denied that in 1867 there was a separation between Bhagwant and Girdhari; and further averred that if there was a separation there was subsequent "reunion." She substantially contended that the estate remained undivided in the possession of Bhagwant Singh, and was governed by the sanad granted to him under Act I of 1869, and that in view of the circumstances set out in the written statement, Girdhari Singh, on the death of Bhagwant Singh, became the heir under S. 22, Cl. 6, of the Act, and that on Girdhari's death the defendant, as his widow, became entitled to the same. On these pleadings, which were considerably amplified in the course of the trial by the replication of the plaintiff and additional written statements filed on behalf of the defendants, the case went to trial before the Subordinate Judge of Lucknow, who framed a considerable number of issues.

His conclusions are thus summarized by the learned Judge in his judgment:

I hold as it is clear from the above discussion that Kunwar Bahadur Singh never transferred the disputed property to Bhagwant Singh, that it remained in the ownership of the entire coparcenary body up to the time of confiscation, that soon after his being made a proprietor by letter of 10th October 1859, he began to treat the property as belonging to the joint family (Issue 1 (b)), that Bhagwant Singh admitted Girdhari Singh's right as a coparcener at the Second Summary Settlement (Issue 2); that no primogeniture sanad was ever granted to Bhagwant Singh, who only received an ordinary sanad about the property of which he had become owner some time before, that he had received the sanad as a representative of the joint Hindu family (Issues 3 (a), (b)); that Bhagwant Singh admitted the equal rights of Girdhari Singh in reply to Circular Order of Government declaring in favour of succession according to the laws of his tribe and religion as against the rule of impartibility (Issue 5); that Bhagwant Singh admitted the equal rights of Girdhari Singh during the proceedings connected with the first Regular Settlement, that the decrees were obtained by him as head and trustee of the joint Hindu family (Issues 6 (a), (b)); that up to July 1867, Bhagwant Singh declared and treated the property included in Lists A and B as joint family property subject to Mitakshara Law, that Bhagwant Singh by his words and deed transferred the entire property to the coparcenary body of which he was a member (Issues 7 and 8); that the property in Lists A and B annexed to the plaint was the joint family property of Bhagwant Singh and Girdhari Singh (Issue 1 (a)); that plaintiff was in no way estopped from pleading the subsistence of the joint Hindu family during the lifetime of her father and taking advantage of the legal consequences of this plea (10 (a) and (b)).

He further held that the proceedings initiated by Girdhari Singh in 1867

effected a separation of the joint family, and transferred Girdhari's share to Bhagwant Singh "in lieu of a monetary payment." He overruled the plea of reunion put forward by the defendant.

He held further that the sanad granted to Bhagwant Singh was not a primogeniture sanad, that his name was, by mistake, entered in List 3, which deals with primogeniture grants, and consequently the succession to the estate was governed by S. 23 of Act I of 1869 (to which reference will be made later in the course of this judgment). He was of opinion that on Bhagwant's death his widow became entitled to the estate, and that her renunciation in 1879 in favour of Girdhari did not affect the rights of the plaintiff, who claims as the reversioner. He accordingly decreed the suit.

From this decree the defendant appealed to the Court of the Judicial Commissioner of Oudh. The learned Judges of the appellate Court came to a totally different conclusion. They held, in substance, that the sanad obtained by Bhagwant Singh was a primogeniture grant; they overruled the allegation of the plaintiff that Bhagwant's name was entered by mistake in List 3, whereas it should have been entered in List 4. They held that the succession to the estate came under the provisions of S. 22, Cl. 6, of the Act; and that Girdhari Singh became, on the death of his brother, Bhagwant, lawfully entitled to the estate which vested in him as the taluqdar. They held also that although the settlement that had been effected with Bhagwant Singh created a "trust" in favour of his brother Girdhari Singh, that trust was "discharged" by the agreement entered into between them in 1867, and that thereupon Bhagwant Singh took the whole estate as the taluqdar "discharged" of the trust in favour of his brother. They held further, in agreement with the trial Judge, that in 1867 there was a separation between the two brothers, and as a consequence the arrangement effected between Bhagwant and Girdhari in that year gave a complete title to the elder brother in the estate. They accordingly came to the conclusion that the defendant was rightfully entitled to the taluqa as the widow of Girdhari Singh, and that the suit should be dismissed with costs.

The plaintiff has now appealed to His Majesty in Council.

Their Lordships consider it desirable at this stage to recapitulate briefly the main contentions of the parties.

Having regard to the application of Girdhari in July, 1867, both the Courts below have rightly overruled the plea of the defendant that the two brothers remained joint until Bhagwant's death in 1871. Had that issue been decided against the plaintiff the legal result would have been that the whole estate under the personal law of the parties would have vested in Girdhari by survivorship. It was for this reason that the defendant denied that there had been any partition between the brothers in 1867.

The plaintiff's case, on the other hand, is that there was a partition in 1867, and that by the compromise of the 8th of September in that year the share to which Girdhari was entitled was, as the Subordinate Judge puts it, "transferred to Bhagwant Singh," and the whole property thereupon vested in the eldest brother. Her case is that the taluqa never came under Act I of 1869, and if it did, the succession to it fell under S. 23 of the Act and not under S. 22.

Regarding the inclusion of Bhagwant's name in List 3, as already mentioned, the plaintiff's allegation was that it was entered by mistake in that list; that it should have, in fact, been entered in List 4.

Thus two facts become of crucial importance. First: what was the nature of the transaction between Bhagwant Singh and Girdhari in September, 1867, and whether the sanad granted by Government to Bhagwant Singh was a primogeniture grant the succession under which is governed by S. 22.

Section 22 relates to estates held by taluqdars included in List 3 prepared under S. 8 of the Act. In the case of other estates where the descent is governed by the personal law S. 23 applies.

Section 22, Cl. 6, under which the defendant contends the taluqa came to her husband Girdhari on the death of his oldest brother, runs as follows:

If any Taluqdar or grantee whose name shall be inserted in the second, third or fifth of the lists mentioned in S. 8, or his heir or legatee, shall die intestate as to his estate, such estate shall descend as follows, viz:

After providing for the succession of lineal descendants and adopted sons, it declares:

... then to the eldest and every other brother of such taluqdar or grantee, heir or legatee, successively, according to their respective seniorities, and their respective male lineal descendants, subject as aforesaid.

Section 23, on which the plaintiff rests her case, is as follows:

Except in the cases provided for by S. 22, the succession to all property left by taluqdars and grantees, and their heirs and legatees, dying intestate, shall be regulated by the ordinary law to which members of the intestate's tribe and religion are subject.

The settlement with Bhagwant Singh was effected in July, 1858. By the letter of the Governor-General in Council of the 10th October 1859, the settlement thus made conferred full proprietary title on every taluqdar with whom it was made, and he acquired thereunder a permanent heritable and transferable right in the estate.

In 1860 a sanad was granted to Bhagwant Singh with regard to the nature of which there is great dispute between the parties. The Subordinate Judge has accepted the allegation of the plaintiff that it was an ordinary sanad. The Judicial Commissioners have held, supporting the defendant's contention, that it was a primogeniture grant. The Act became law in January, 1869. During this period between the "Second Summary Settlement" and the passing of the Act the Government was engaged in interrogating the taluqdars with whom the settlement had been made, in what class (included subsequently in the lists framed under S. 8) they desired to be included. Throughout these proceedings Bhagwant denied that there was any custom of gaddinashini in his family or that the estate descended to a single heir by the custom of the family. In the khewats prepared after the settlement, the names of both Bhagwant and Girdhari were entered as joint proprietors. There can be little doubt that from the Second Summary Settlement up to the Regular Settlement in 1864, Bhagwant Singh, by his acts and declaration, obtained the estate for himself and his brother Girdhari Singh, as members of the joint Mitakshara family. In 1867, however, a complete change took place in the relations of the two brothers. On the 15th July of that year, Girdhari Singh applied to the Court of the Financial

Commissioner of Oudh for the partition of his share in the estate. His application is in the following terms:

In the Lambardari column Bhagwant Singh is entered as sadar malguzar (chief revenue payer) and in the khewat (the proprietary register) and other papers the names of us both are recorded in the Remarks column as possessing half and half [share] under each other's verification. It was for this reason that a sanad containing the words gaddinashini (succession to gaddi) was not conferred on us. Nor did we try to obtain it. No custom of gaddinashini by a single person or of talaqdari exists amongst us. The karindas (agents), servants and expenditure have continued to be in common and on equal terms on behalf of both the parties from an ancient time prior to that of our father on account of harmony, jointness and commensality amongst us. Till now, owing to the minority of both of us under the guardianship of our mother, and the prevalence of mutual good-feeling, jointness in making collections and expenses private and public, none applied for perfect partition of land but remained joint of their own accord. But now I pray this honourable Court that after perusal of the sanads hereto annexed, wherein my brother Bhagwant Singh, sadar malguzar, has been admitted as holding a moiety share as shown above, a partition of the villages be effected by metes and bounds.

Subsequently, on the 8th September 1867, the following compromise was entered into between the two brothers:

Since I [Girdhari Singh], the plaintiff, have applied in the Courts of the Financial Commissioner and the British Indian Association for partition of the Taluqa containing the villages Gokulpur, Aseni and others, situate in District Lucknow to the extent of a moiety share, now a compromise has been entered into between me, the plaintiff, and my brother, the defendant, to this effect. At present there is a good deal of indebtedness, so he (my elder brother) will be paying me Rs. 1,200 a year for daily expenses from 1275 Fasli and full amount of Rs. 2,600 annually after discharge of the debt. If the aforesaid amount remains unpaid then a property, that is, the villages reserving the profit of Rs. 2,600 after deducting the Government revenue and the collection charges and so forth, be set apart from the Taluqa. Therefore there is left no dispute on my part as regards partition of the aforesaid Taluqa. Nor shall I ever raise any objection. Hence I, by filing this application in the shape of a compromise arrived at between us and verified by my brother, namely, Kuar Bhagwant Singh, in token of approbation pray that this case be excluded from the arrears and consigned to the records.

This document is signed both by Girdhari Singh and Bhagwant Singh. Bhagwant Singh's signature deserves notice. He signs himself not as a lambar-dar nor as a malguzar, but as taluqdar. To the significance of this particular designation their Lordships will call further attention later in the course of this judgment.

The primary matter for consideration, therefore, is what was the effect of this arrangement in regard to the estate. In this connexion it is to be noted that on the 10th June 1871, some months before his death, Bhagwant Singh applied to the Court of Wards to take charge of the estate. To this application Girdhari Singh does not appear to have been a party, and, so far as the records show, he took no part in respect thereto. The property was taken charge of by the Court of Wards and remained in its charge until Girdhari took possession of the property on the decease of his brother in December 1871. There were disputes between Girdhari Singh and Bhagwant Singh's widow Maharani in 1872, and on the 10th January of that year an agreement was entered into between the widow of Bhagwant and his brother Girdhari Singh in counterparts. The first, executed by Girdhari, is in the following terms:

Whereas the estate Taluqa Gokulpur, Aseni, etc., in District of Lucknow and Bara Banki is in the proprietary possession of Kuar Bhagwant Singh my real brother by hereditary right and by virtue of the sanad granted by Government, and the aforesaid Taluqa has on the application of my brother been placed under the superintendence of the Court of Wards since the 10th June 1871. Since my brother died on the 9th December 1871, and my name has been entered as proprietor of the aforesaid estate, and at present as well as after release from superintendence of the Court of Wards, I, the declarant, am to be in charge of making collections of the income of the Ilaga and management of the estate, therefore I with consent do covenant and place on record that after payment of Government revenue, the Ilaga charges with the exception of the household expenses, whatever shall be left as surplus and profit from the income of Ilaga, I shall be paying to Mt. Maharani, widow of Kuar Bhagwant Singh, as a moiety share according to rendition of accounts without any excuse and dispute.

Maharani, in the document executed by her, states as follows:

Whereas the estate comprising Taluqa Gokulpur, Aseni and other villages situate in Lucknow and Nawabganj Bara Banki Districts is the ancestral property of my husband, and was, by virtue of the sanad granted by the Government, in the proprietary possession of my husband, Kuar Bhagwant Singh, Taluqdar; whereas, the said Taluqa, on an application of my husband, was taken under the management of the Court of Wards from the 10th June 1871; and whereas my husband died a natural death on 9th December 1871, I (and the other person) having agreed together, I agree and accept and hereby declare and commit to writing that in respect of the Taluqa the name of Kuar Girdhari Singh, real brother of my husband, be entered as against the Number, and Kuar Girdhari Singh

to collect income from the Ilaga, to look after and manage the Ilaga now and after the termination of the management by the Court of Wards, that after paying the Government revenue and incurring expenses relating to the Taluqa, excepting the domestic expenses, he (Kuar Girdhari Singh) from such profits of the Ilaga as might be left surplus, shall divide to me one-half according to the amount as might be found due on rendition of account, and the same is agreeable and acceptable to me, and to this I have no sort of objection or dispute.

Disputes again broke out between Maharani and Girdhari in 1879 which were settled by deeds executed on the 4th September 1879, in which Maharani on her part states as follows:

Therefore I, the executant, too, while in a sound state of body and mind, without reluctance and coercion, do hereby covenant, and reduce it to writing, that I, the declarant, relinquish all my claims and rights to the Taluqa; and now there remains no claim or concern or right to me in respect of the said Taluqa as well as the sir land decreed on 3rd November 1873, by the Court of the Judicial Commissioner of Oudh. I shall not make any sort of interference in the Taluqa, and put forward no claim with the exception of one for receipt of the life maintenance amounting to Rs. 2400, if not paid at the stipulated periods of instalments. If anything contrary to this agreement occurs, it will be simply illegal. If the said Kuar Sahab fails to pay the aforesaid amount in the undermentioned instalments, then I shall be at liberty to realize the same from the hypothecated property, as well as from moveable and immovable property of the Kuar Sahab, myself or through Court, and no objection of the Kuar Sahab will be entertained. The said Kuar Sahab has given me 100 bighas khair out of the numbers of sir land in villages Aseni and Gokulpur, numbered below, entered in this deed of agreement, executed by Kuar Girdhari Singh, rental Rs. [paper torn], for cultivation, without the powers of alienation by sale, gift and mortgage, for my life. The rental [paper torn] shall be paid by me annually and at each instalment, without any objection, which if I raise or do not pay the rental hereof, the Kuar Sahab may deduct the same from the maintenance allowances fixed and I shall have no objection thereto.

Their Lordships accept the contention that the renunciation by the widow of Bhagwant Singh of her rights and her claims to the estate does not bind the reversioner, the daughter of Bhagwant Singh. But they cannot be omitted altogether from consideration as they form part of the *res gestae* and help in explaining the contentions of the parties.

The Judicial Commissioners have in appeal reviewed at length the authorities on which reliance has been placed by the parties, and have marshalled the facts with great ability. Their Lordships desire to observe that they entirely con-

cure with the Court below in the view that there is absolutely no evidence to show that Bhagwant Singh's name was entered in List 3 by mistake. (His Lordship set out the relevant provisions of Act (1 of 1869) and proceeded.) As already stated, the Government made every endeavour to make the lists conform with the wishes of the taluqdars. Bhagwant Singh was unquestionably a taluqdar and his name was included in List 3. There is absolutely no evidence in proof of the allegation that Bhagwant's name was included by mistake in that list, as alleged by the plaintiff.

Section 10 of the Act provides as follows:

No person shall be considered taluqdars or grantees within the meaning of this Act, other than the persons named in such original or supplementary lists as aforesaid. The Courts shall take judicial notice of the said lists and shall regard them as a conclusive evidence that the persons named therein are such taluqdars or grantees.

In the case of *Murtazu Husain Khan v. Mahomed Yasin Ali Khan* (1) their Lordships have held as to the effect of S. 10, as follows:

That section provides that the Court shall take judicial notice of the lists and shall regard them as conclusive evidence of the facts they record.

In the absence of any evidence to show that Bhagwant's name was wrongly inserted in List 3, his inclusion in that list is, in their Lordships' opinion, conclusive that the sanad he obtained was a primogeniture grant. In other words, that he was a taluqdar taking an estate under a primogeniture sanad under the provisions of the Act. Their Lordships are also satisfied that on the evidence to which the Judicial Commissioners refer, the defendant has established that a primogeniture sanad was issued to Bhagwant Singh.

In the view they take of the case they do not think it necessary to refer in detail to the authorities on which the plaintiff rests her claim. In the case of *Mt. Thukrain Sookraj Koowar v. The Government* (2) Lord Justice James, delivering the judgment of the Board, pointed out that the grant of an estate under the Act to a specific individual did not operate as an absolute conveyment

(1) [1916] 38 All 552=36 I. C. 299=43 I. A. 269 (P. C.).

(2) 14 M. I. A. 112 (P. C.).

of an exclusive title on the taluqdar, independent of the equitable rights of other parties possessing rights thereto before the confiscation of the estate by the Crown.

In *Hurpurshad v. Sheo Dyal* (3) the taluqdar was held to have transferred, by an inter vivos act, the estate to the joint family under S. 15 of the Act. After quoting the finding of the Financial Commissioner regarding the character and meaning of the document under consideration in that case the judgment proceeded thus:

Their Lordships concur in this view. They go further however, and are of opinion that the declaration in those documents of the wish of Gourree Shanker, acted upon as it was by him and by the other members of the family in his lifetime, and coupled with the tabular statement, was evidence sufficient to prove an alienation inter vivos, which in Gourree Shanker's lifetime transferred the property to the family, to be held by them as joint family property. No evidence was given to show that the rents and profits of the estate did not continue, even during the life of Gourree Shanker to be brought, like the other assets of the family, to the family treasury, for the use of the undivided family. In the Cawnpore case *Mohun Lall*, one of the sons of Chotay, said: 'Every one used to take out of the profits as much as he required.' In the tabular statement sent in in May 1860, Rajah Gourree Shanker entered his own name not alone, but with the other members of the family, as the persons fit to succeed; he could not have intended to devise to himself by a Will or codicil—he clearly meant, by entering his own name as one of the sharers, to express his wish and intention that the estates should be held jointly during his own life as well as after his death.

In *Thakoor Hardeo Bux v. Thakoor Jawahir Singh* (4) the Board re-enunciated the principle that a person who has been registered as a taluqdar under Act I of 1869, and has thereby acquired a taluqdari right to the whole property, may nevertheless have made himself a trustee for another of a portion of the beneficial interest in the lands comprised within the estate.

These principles have been maintained in all the decisions on the subject.

The present case appears to their Lordships to stand on a different footing. Here Girdhari Singh was clearly entitled to a share of the estate, and it would not be necessary to refer his right to an implied trust in his favour in respect of a moiety of the estate. Up to 1864

Bhagwant Singh explicitly admitted his right. But what happened in 1867 completely altered the position of the two brothers in relation to the estate. Although there is no direct evidence, the circumstances leave no room for doubt as to what happened. Bhagwant was getting old. Early in 1871 he applied to the Court of Wards to take charge of the taluqa, and in December of that year he died. He had no male issue, and under the Act his brother would be the heir. So he would be if the family had remained joint. It is not surprising, therefore, that Girdhari Singh consented to the taluqa vesting in his elder brother under the sanad he had received, and his being included in List 3. The Government's dealings subsequent thereto with Bhagwant Singh are consistent only with the hypothesis that Bhagwant took the estate as included in a primogeniture grant. Reference has been already made to the document of the 8th September 1867, in which Bhagwant Singh describes his status as that of a taluqdar. On the 27th January 1869, there is an enquiry by the Government to the following effect:

With reference to the concluding portion of para. 7 of the Chief Commissioner's letter, every sanad taluqdar should be required to state in writing whether he desires to enter List 3 or List 4, and every grantee must similarly declare whether he elects for List 5 or List 6.

The portion of the enquiry that may entail some labour will be the investigation of claims to be considered taluqdars by those who have no sanads, and in every such case the Deputy Commissioner will record in writing the particulars of the claim, with his opinion, to which that of the Commissioner should be added. No claims will be rejected without a reference, but it will be convenient if the Deputy Commissioner will show those he accepts and rejects separately.

On the 11th February 1869, Bhagwant Singh, "Taluqdar of Aseni," was requested by the Dy. Commr. of Lucknow as follows:

As it is necessary for me to inspect the taluqdari sanad in Persian as well as in English, relating to your taluqa, you are hereby requested to send the required sanad at once for perusal.

So far as appears from the record the sanad was sent in and duly inspected, and returned to Bhagwant. A list of sanads issued by the Chief Commissioner to the taluqdars in Oudh together with an extract from the list, has been made an exhibit in the case. There is an endorsement to the effect in answer to the query whether the English sanad had or had not the primogeniture clause.

(3) [1875] 3 I. A. 259=26 W. R. 55 (P. C.).

(4) [1878] 3 Cal. 522=4 I. A. 178 (P. C.).

The answer embodied in the extract is "It has."

In view of these considerations their Lordships entertain no doubt that (1): a primogeniture sanad was granted to, and eventually accepted by, Bhagwant Singh; (2) that he was the taluqdar under the grant; (3) that on his death without male issue or adopted son, the taluqa devolved under Cl. 6 of S. 22, on his sole surviving brother, Girdhari Singh; (4) and that on Girdhari Singh's decease in 1919 it devolved, under Cl. 7, on his surviving widow, the defendant, Indar Kunwar.

Their Lordships, on the whole, are of opinion that the conclusion at which the Judicial Commissioners arrived is right, and should be affirmed. They will accordingly humbly advise His Majesty that this appeal should be dismissed with costs.

Their Lordships desire, however, to observe that in their judgment they have confined their attention exclusively to the plaintiff's claim to the taluqa.

Appeal dismissed.

Solicitors for Appellant — Barrow Rogers & Nevill.

Solicitors for Respondents—H. S. L. Polak.

* * A. I. R. 1927 Privy Council 15

(From Rangoon: A. I. R. 1924 Rang. 363)

30th November 1926

LORDS ATKINSON AND CARSON AND
SIR JOHN WALLIS

Ma Mi and another—Appellants.

v.

Kallander Ammal—Respondent.

Privy Council Appeal No. 52 of 1925.

* * (a) *Evidence Act, Ss. 63 and 60*—*Oral evidence to be secondary evidence of the contents of a document must be of persons who have read the document.*

The statements of the witnesses who have not themselves read the document are not secondary evidence of the contents of the document within the meaning of S. 63. Oral evidence of the contents of the document must be given by some person who has seen those contents, that is to say, who has read the document. Evidence that the witness saw the document and heard it read out by some one else is only hearsay so far as the contents are concerned, and does not fulfil the requirements of S. 60.

[P 16, C 1]

* (b) *Mahomedan Law*—*Divorce can be effected by mere words—When words are clear*

no proof of intention is necessary—Pronouncement need not be made in presence of the wife.

According to Mahomedan law, a husband can effect a divorce whenever he desires. He may do so by words without any talaknama or written document, and no particular form of words is prescribed. If the words used are express or well understood as implying divorce, such as talak, no proof of intention is required. If the words used are ambiguous, the intention of the user must be proved. It is not necessary that the repudiation should be pronounced in the presence of the wife, or even addressed to her.

[P 16, C 2]

G. R. Lowndes and R. W. Leach—for Appellants.

A. M. Dunne and E. B. Raikes—for Respondent.

Sir John Wallis.—This is an appeal from the decree of the High Court at Rangoon reversing the decree of the District Court of Pegu. The suit was brought by the respondent Kallander Ammal, to recover the whole, or in the alternative, a part of the estate of her deceased husband, Sheik Moideen, who died intestate on the 29th February 1920.

In her plaint she claims to be the sole heir of her deceased husband, and alleges that the first defendant, Ma Mi, falsely claims to have been his lawful wife, and that the second defendant Mahamed Eusoof, falsely claims to be the legitimate son of the deceased Sheik Moideen by one Ma Kin; and that neither of them has any claim to any portion of or interest in the estate of the deceased. Notwithstanding which, as she alleges, the defendants have been withholding the property of the deceased from her. The defendants filed a joint written statement in which they denied that the plaintiff was heir to the estate, and pleaded that prior to his death the deceased divorced the plaintiff according to Mahomedan Law, and that the said divorce was communicated to the plaintiff, and the plaintiff thereafter ceased to be the wife of the deceased if she was legally married to him at any time. They also pleaded that as widow and son of the deceased they were his only heirs and legal representatives.

The District Judge framed four issues of which the second:

Was there a valid divorce between plaintiff and Moideen?

alone was tried. On this issue the District Judge found that there was ample evidence to prove that the deceased executed a talaknama or a divorce document about two years before

his death in Burma, where he resided, and sent it to his wife in India where she was residing, and he accordingly dismissed the plaintiff's suit.

The plaintiff appealed to the High Court at Rangoon, who held that there was no legal evidence on record of the contents of the divorce document, as the evidence tendered in the absence of the document itself was not secondary evidence within the meaning of S. 63 of the Indian Evidence Act. They accordingly held that a divorce by talaknama or writing was not proved; and being further of opinion that no oral divorce was proved by the evidence on record, they allowed the appeal and decreed the plaintiffs' suit.

At the trial several of the witnesses deposed to having heard the talaknama read out, and to having seen it executed by the deceased but the writer of the document was not called, and none of the witnesses had read it so as to be able to speak de visu to its contents. Their Lordships are of opinion that in this state of things the learned Judges of the High Court were right in holding that the statements of the witnesses were not secondary evidence within the meaning of S. 63 of the Act, which so far as material, is as follows:

Secondary evidence means and includes—

* * * * *

oral accounts of the contents of a document given by some person who has himself seen it.

In their Lordships' opinion the learned Judges were right in holding that this means that the oral evidence of the contents of the document must be given by some person who has seen those contents, that is to say, who has read the document. Evidence that the witness saw the document and heard it read out by someone else is only hearsay so far as the contents are concerned, and does not fulfil the requirements of S. 60 as to oral evidence generally:

Oral evidence must in all cases whatever be direct; that is to say, if it refers to a fact which could be seen it must be the evidence of a witness who says he saw it.

The question whether the document was a talaknama or deed of divorce was a fact which could be seen by reading it, and therefore, in accordance with the general principle embodied in the section could only be spoken to by a witness who had himself read it.

In this state of the evidence the

learned Judges in their Lordships' opinion rightly held in the absence of any legal evidence of the contents of the document in question, that a divorce by talaknama or written document, as found by the District Judge, was not proved.

They then proceeded to consider whether there was any evidence on record sufficient to prove that the deceased, on the occasion when the document was drawn up and executed, used words which would, in themselves, be sufficient to constitute an oral divorce under Mahomedan Law. According to that law, a husband can effect a divorce whenever he desires. He may do so by words without any talaknama or written document, and no particular form of words is prescribed. If the words used are "express" or well understood as implying divorce, such as talak, no proof of intention is required. If the words used are ambiguous, the intention of the user must be proved. It is not necessary that the repudiation should be pronounced in the presence of the wife, or even addressed to her. On an examination of the evidence the learned Judges came to the conclusion that there was no sufficient evidence of any such oral divorce, and they accordingly reversed the judgment of the lower Court and gave the plaintiff a decree.

There is no doubt the evidence of two witnesses on the record that the deceased on this occasion uttered three times the word "talak" which, if uttered once, would be sufficient to constitute an oral divorce, and that he also told the witnesses that the document was a talaknama or divorce document. As to this, the learned Judges have held that the evidence as to the use of the word "talak" by the deceased was not reliable and that it was not proved that the deceased told the witnesses that he had divorced his wife, or indeed that he had any intention of effecting a divorce otherwise than by the execution and transmission of the document which has not been proved.

Their Lordships see no sufficient reasons for differing from these findings, which are sufficient to dispose of the case. (Their Lordships then examined the evidence and continued.) Their Lordships agree with the learned Judges, that the evidence does not sufficiently establish what the deceased actually said to enable them to say whether the words used amounted to a statement that the

deceased had divorced his wife, or merely indicated his intention of divorcing her by the execution and transmission of the talaknama.

For these reasons their Lordships are of opinion that the appeal fails and should be dismissed with costs, and will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for Appellants—*Waterhouse & Co.*

Solicitors for Respondent—*T. L. Wilson & Co.*

* * A. I. R. 1927 Privy Council 17

(From Madras)

9th November 1926

LORDS PHILLIMORE, SINHA, BLANESBURGH AND SALVESEN

Pathumsa Ammal—Appellant.

v.

Rajagopala Mudaliyar—Respondent.

Privy Council Appeal No. 9 of 1925.

(a) *Civil P. C., O. 34, R. 2*—Accounts, failure to take is not material if amount would be the same as in decree.

Although it is usual to have a taking of accounts, but if the result of taking them would be to give the same sum as that passed in the decree, there is no serious point in the Court not directing the account to be taken. [P 17 C 1, 2]

* * (b) *Civil P. C., O. 34, R. 2*—Time for redemption.

It is not an absolute rule of law that less than six months cannot be allowed for redemption.

[P 17 C 2]

L. DeGruyther and *K. V. L. Narasimham*—for Appellant.

A. M. Dunne and *E. L. Thornton*—for Respondent.

Lord Phillimore.—Their Lordships need not trouble counsel for the respondent.

The greater number of the numerous and serious charges made in the plaint in this action have been disposed of in the Courts of first and second instance. Amongst those charges is the charge of negligence against the present plaintiff's guardian. The decree which is now complained of is admitted to have been well founded and right, excepting in respect of two matters, the amount actually put into the decree and the short period of redemption. That it is usual to have a taking of accounts is no doubt, the case; but if the result of taking them would be to give the same sum as that passed

in the decree, there is no serious point in the Court not directing the account to be taken; and if the decree be rectified in respect of that account, all that can be contended for is done. It is quite possible that the Judge who passed this decree did not quite, at the moment, see clearly how far the compromise went and how far he was bound, in dealing with the three defendants not parties to the compromise, to see that every item of the account and every point found against them was proved by evidence and not founded upon the compromise. His decree could have been appealed against in respect of such matters as were not warranted by the evidence, because he could not, in reliance upon the compromise, give any judgment against those three defendants.

Now their Lordships would desire to see whether or not serious mischief would result from the fact that the decree erred in these respects. The way to do that is to imagine the decree to have been settled and to have been properly drawn. It ought, on the contention of the appellant, to have found a lesser sum due to the extent of perhaps Rs. 1,100. This their Lordships will assume, and, also, that though it is not an absolute rule of law, there should in the circumstances have been given the fullest possible term for redemption, that is, six instead of one month. Their Lordships will suppose that the decree is altered in those two points—they still find no reason to suppose that the appellant would have benefitted if the decree had put her in that position. The appellant has not shown that she or her guardian could have done anything to save the property from sale. The sale proceedings are admitted to be regular; and the mortgagee is not making any personal claim against the defendant in respect of the deficiency still due on the mortgage. On the whole their Lordships think that the High Court, very largely for the reasons which appear in the judgment of the learned Judges, came to the right conclusion and this appeal must be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for Appellant—*T. L. Wilson & Co.*

Solicitor for Respondent—*H. S. L. Polak.*

* A. I. R. 1927 Privy Council 18

(From Patna)

29th November 1926

LORDS SINHA AND BLANESBURGH,
MR. AMEER ALI AND LORD SALVESSEN

Ramsaran Mandar and others—Appellants.

v.

Mahabir Sahu—Respondent.

Privy Council Appeal No. 22 of 1925;
Patna Appeal No. 12 of 1924.

* (a) *Hindu Law—Suit for specific performance of agreement to sell joint Hindu family property by karta—Sons and grandsons impleaded—Death of karta pending suit—Relief as to specific performance abandoned—No decree can be passed against sons and grandsons.*

A suit was instituted by plaintiff against certain members of a joint Hindu family for specific performance of a contract to sell with an alternative claim for damages for breach thereof. It was alleged that Defendant No. 1, as karta of the family, had entered into an agreement to sell certain house of the family. The other defendants were the sons, grandsons and nephews of Defendant No. 1. The suit was dismissed and plaintiff appealed. Pending appeal, Defendant No. 1 died and the cause title of the suit was amended and Defendants Nos. 2, 5 and 6 were shown as heirs of Defendant No. 1 and claim for specific performance was given up at the hearing.

Held : the amendment of the cause title in the appeal before the High Court on the death of Defendant 1 did not alter the nature of the suit. Nor did the abandonment of the claim for specific performance at the hearing of that appeal alter the suit as framed into an action for money had and received, or for the recovery of a debt, and no decree could be passed against the surviving defendants. [P 19 C 2]

* (b) *Civil P. C., O. 6, R. 17—Amendment changing nature of suit is not permissible—Even if permissible it cannot be allowed in appeal to Privy Council—Privy Council.*

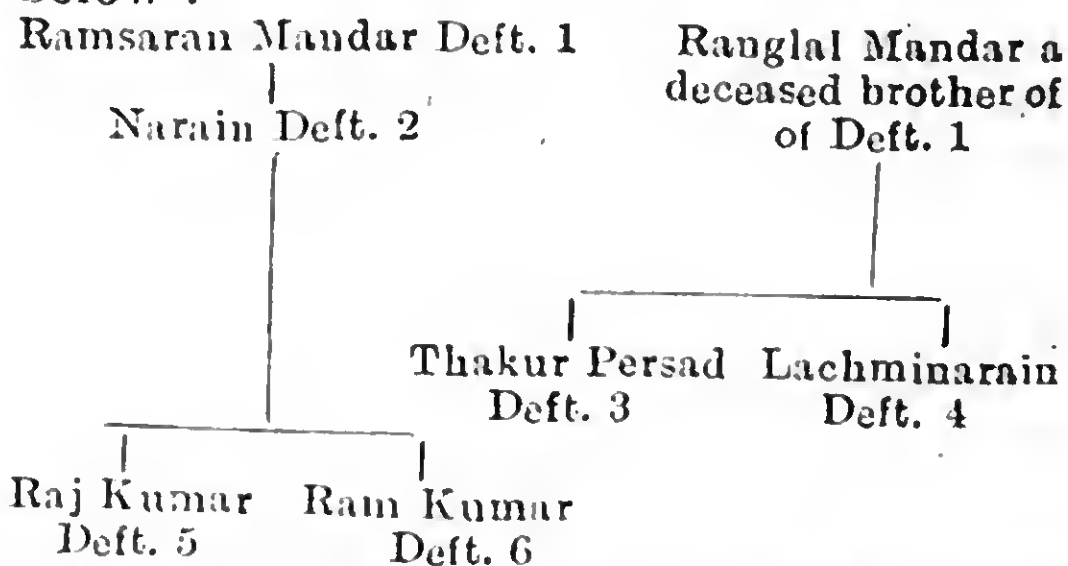
It is not permissible by amendment to change the nature of the suit as framed; and even if it were, such a course cannot be permitted in appeal to the Privy Council as the defendants affected by such amendment must have an opportunity to rebut such new cause of action, a course which would involve fresh written statements and a fresh trial. [P 20 C 1]

G. R. Lowndes and A. Majid—for Appellants.

L. DeGruyther and B. Dube—for Respondent.

Lord Sinha.—This is an appeal from a judgment and decree dated the 22nd February 1924, of the High Court of Judicature at Patna which reversed a judgment and decree, dated 9th March 1921, of the District Judge of Durbhanga and made in Suit No. 835 of 1919.

That suit was instituted by the plaintiff, Mahabir Sahu, against six defendants, all members of a joint Hindu family, constituted as shown in the pedigree below :



Defendants 4, 5 and 6 were all minors at the time the suit was filed, but Defendant 4 attained majority before judgment. Defendant 3 died before filing any written statement.

The plaintiff alleged that Ramsaran (Defendant 1), as head and karta of the above joint family, entered into an agreement with the plaintiff to sell certain house and lands belonging to the said family for Rs. 11,000, and on the 20th August 1919, executed an agreement for such sale (Ex. 5 in the case) on receipt of Rs. 9,000 as earnest money, "affixing a stamp with his signature and thumb impression thereon" and stipulating to execute and register a regular conveyance within three weeks on receipt of the balance of the consideration. Ramsaran failed to execute the conveyance though called upon to do so, and the plaintiff prayed for specific performance of that agreement on payment of Rs. 2,000, or,

if for any reason a decree for specific performance be not possible in the opinion of the Court, Rs. 9,000, the principal amount of the earnest money, with interest thereon at Rs. 2 per month by way of damages, may be awarded to the plaintiff against the defendants.

By his written statement Ramsaran denied that he entered into any such agreement, or that he executed the document (Ex. 5) as alleged or "received a single farthing as earnest money." He asserted that it was a false case altogether put forward by one Kisorilal, in the name of his father-in-law, the nominal plaintiff, with a view wrongfully to obtain the properties in suit which he had unsuccessfully claimed in previous litigation; that the value of the properties was at least Rs. 21,000, and the story of an agreement to sell them for Rs. 11,000 was false and fraudulent.

Written statements were put in, on behalf of the Defendants 2 and 4, and of the minor Defendants 5 and 6, by which they also denied the truth of the plaintiff's story, and further pleaded that even if Defendant 1 entered into any such transaction

he had no right to make and contract to execute a sale deed in respect of the said properties, nor were these defendants at all benefitted by the said act.

The two chief issues raised on these pleadings were numbered 4 and 6 respectively in the trial Court, and were as follows :

Issue 4—Is the letter of agreement dated 20th August 1912, genuine and for consideration? Did the Defendant 1 enter into any agreement for the sale of the properties in suit and receive Rs. 9,000 as earnest money as alleged in the plaint?

Issue 6—Are the other defendants bound by the agreement entered into by Defendant No. 1?

On the fourth issue the District Judge held that the agreement (Ex. 5) was not proved to be genuine, and that even if genuine there was no consideration for the same.

On the sixth issue he held that the contract was not binding on the other defendants, as the plaint did not allege, nor was any evidence adduced by the plaintiff, to show that the contract was entered into for the benefit of the defendant's family, or that it was necessary as an act of prudent management.

The District Judge accordingly dismissed the suit with costs.

The plaintiff appealed to the High Court of Patna. Pending appeal Ramsaran (Defendant 1) died, and by an order, dated 19th December 1922, the cause title was amended as follows :

Mahabir Sahu—Plaintiff—Appellant.

v.

Ramsaran Mandar and, after his death, Respondents 2, 4 and 5 are his heirs (vide Order, dated 19th December, 1922); 2, Narayan Mandar; 3, Lachminarain Mandar; 4, Raj Kumar Mandar; 5, Ram Kumar Mandar (Nos. 4 and 5 minors), through Babu Soney Lal Choudhury, Defendants Respondents.

At the hearing of the appeal in the High Court, counsel on behalf of the plaintiff (appellant) gave up his claim for specific performance, but contended that plaintiff was entitled to recover the earnest money paid (Rs. 9,000), with reasonable interest.

The learned Judges of the High Court proceeded upon the view that the only issue which the Court below had to try was forgery or no forgery. They were of

opinion that the expert evidence to the effect that the thumb-mark on Ex. 5 was identical with the thumb-mark of Defendant 1, taken in Court, was conclusive as to the genuineness of the mark, and so strongly supported the plaintiff's case that the improbabilities, contradictions and suspicious circumstances relied upon by the District Judge were not sufficient to displace the evidence on the plaintiff's side with regard to the execution of the agreement and the receipt of Rs. 9,000 by the defendant Ramsaran. On this basis the High Court set aside the decree of the lower Court and decreed that the plaintiff was entitled to Rs. 9,000 with interest at 1 per cent. per year from 20th August 1919, to date of decree, and at 6 per cent. on decree, as against all the defendants.

The learned Judges do not appear to have considered either Issue No. 6 or the District Judge's finding thereupon.

At the hearing of the appeal before this Board there was considerable argument at the Bar on the question of the genuineness of the agreement Ex. 5 and the receipt of the Rs. 9,000, as to which the two Courts in India have differed. Their Lordships are, however, relieved from the necessity of pronouncing any opinion on these questions of fact, inasmuch as the decree of the High Court cannot be sustained in law, even if their conclusions of fact were well founded.

The suit was framed as an ordinary suit for specific performance of an agreement, with an alternative claim for damages for breach thereof, such damages being assessed at Rs. 9,000 (the earnest money paid), with interest at 2 per cent. from date of agreement to date of realization. The amendment of the cause title in the appeal before the High Court on the death of Defendant 1, above referred to, did not alter the nature of the suit. Nor did the abandonment of the claim for specific performance at the hearing of that appeal alter the suit as framed into an action for money had and received, or for the recovery of a debt. Even so the suit was bound to be dismissed as against Lachminarain, Defendant 3, who was not an heir of Ramsaran, Defendant 1, and against whom the liability of sons and grandsons to pay their ancestor's debts under the doctrines of Hindu Law could not be invoked. Mr. De Gruyther, on behalf of

the plaintiff respondent, conceded that point, but relied on that very doctrine in order to support the decree as against Defendants 2, 5 and 6, the son and grandsons of Defendant 1, who are now on the record in a dual capacity. It was urged by Mr. DeGruyther that the decree of the High Court should stand as against Defendants 2, 5 and 6, and the question whether they had in their hands any assets of Ramsaran against which such decree could be enforced might be left to be determined in proceedings for execution of that decree; and that, if necessary, the plaint might be amended even at this stage, under the wide discretionary powers of this Board and the somewhat elastic provisions of the Code of Civil Procedure in that behalf.

Their Lordships cannot accede to these arguments. It is not permissible by amendment to change the nature of the suit as framed; and even if it were, the defendants affected by such amendment must have an opportunity to rebut such new cause of action, a course which would involve fresh written statements and a fresh trial. Their Lordships are unable to permit such a course at this stage.

The result is that no decree can be made against the surviving defendants in this suit. The decree of the High Court must be set aside and the suit dismissed, with costs in all Courts, including the costs of this appeal; and their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitors for Appellants—*Chapman, Walker & Shephard.*

Solicitors for Respondent—*Pugh & Co.*

* A. I. R. 1927 Privy Council 20

(From Calcutta)

19th November 1926

LORDS ATKINSON AND CARSON
AND SIR JOHN WALLIS

Krishnendra Nath Sarkar and others—Appellants.

v.

Rani Kusum Kamini Debi—Respondent.

Privy Council Appeal No. 43 of 1925,
Calcutta Appeal No. 96 of 1923.

* *Landlord and tenant*—Ordinarily landlord can apply for enhancement and the tenant for reduction of rent—Usually "mokarari" is used to denote fixity of rent but absence of this word is not conclusive to the contrary.

Prima facie the rent is liable to enhancement on the application of the landlord or to reduction on the application of the tenant, unless either of them has precluded himself, by contract from claiming such enhancement or reduction respectively.

Apparently the word usually employed in creating a fixed rent in perpetuity is the word "mokarari," though, no doubt, the absence of such word is not conclusive if other words are found in the grant which clearly show that such a rent was intended to be created.

Where a pottah proved "You shall pay the rent year after year according to the kistibandi given in the schedule below. You and your sons and grandsons, etc., in succession, will remain in enjoyment and possession by keeping the boundaries intact as they have been from before. All profits and losses shall be yours, and you shall on no account be competent to pray for a reduction of the rent. You shall abide by the survey and settlement of rent to be made by me when necessary."

Held: that the pottah did not fix the rent in perpetuity but the landlord maintained his right to enhance the rent. [P 20 C 2, P 21 C 1, 2]

L. DeGruyther and E. B. Raikes—for Appellants.

A. M. Dunne, J. M. Parikh and K. Ali Afzal—for Respondents.

Lord Carson.—The suit was brought by the plaintiffs (respondents) as the zamindars and owners of certain lands, against the tenure holders thereof, to enhance the rent of the tenure created in favour of the latter under a joto pottah, dated 5th January 1870. The question for determination in the appeal is whether the rent of the said tenure was, as the appellants contend, fixed by the pottah in perpetuity or was, as the respondents contend, not fixed in perpetuity, but was liable to enhancement in accordance with the provisions of the Ben. Ten. Act, Act 8, 1885, S. 7, sub-S. 1.

The said pottah, which was in the Bengali language, was granted by the predecessor of the respondents, and the material part of it upon which the rights of the parties depend is as follows:

This pottah is granted in respect of the above-mentioned mouzah and the aforesaid jotes by fixing the annual rent thereof at Rs. 418-9-15 gundas in the Company's coin as per details in the schedule, and you also submit a kabuliyat of your own accord. You shall pay the rent year after year according to the kistibandi given in the schedule below. Should you make default in payment of the kists, you shall pay the rent in arrears with interest according to law. You and your sons and grandsons, etc., in succession, will remain in enjoyment and possession by keeping the boundaries intact as they have been

from before. All profits and losses shall be yours, and you shall on no account be competent to pray for a reduction of the rent. You shall abide by the survey and settlement of rent to be made by me when necessary. If you shall make any plea of payment unsupported by dakhilas, the same shall be rejected. You shall not do any improper act, and should you do any, you shall be answerable for it. Should any new tax be imposed by Government, you shall pay the same separately in addition to the rent mentioned in the pottah.

The plaintiff-respondents also claimed in the suit the imposition of a fair rent for land alleged to be held by the appellants by encroachment in excess of the lands leased under S. 52 of the same Act. As regards this second claim there was a finding in favour of the appellants by the Subordinate Judge, and the point was abandoned at the hearing of the first appeal. It was not disputed that under the terms of the said pottah the tenure created was a perpetual and hereditary one having regard to the terms "you and your sons and grandsons, etc., in succession, will remain in enjoyment and possession," etc. This, however, does not in law involve that the rent specified is, therefore, fixed in perpetuity, and it was contended that upon the true construction of the pottah there was nothing to show that the rent was fixed in perpetuity, and that the plaintiffs-respondents were entitled to sustain their claim for an enhancement of the rent. The whole question, therefore, turns upon the true construction of the pottah. The Subordinate Judge of Bogra by his judgment, dated the 27th August 1917, dismissed the plaintiffs-respondents' suit with costs, holding on the construction of the pottah that the rent was fixed in perpetuity and was not liable to enhancement. On appeal, however, to the District Judge of Pabna, he on the 5th April 1919, delivered judgment and passed a decree setting aside the decree of the Court below, holding on the construction of the pottah that the plaintiffs-respondents were not precluded from claiming an enhanced rent, and his judgment was upheld by the High Court of Judicature at Fort William in Bengal by a judgment and decree dated the 16th May 1923; hence the present appeal.

It appears to be common ground that *prima facie* the rent is liable to enhancement on the application of the landlord or to reduction on the application of the tenant, unless either of them has precluded himself by contract from claiming

such enhancement or reduction respectively. The learned Subordinate Judge was of opinion that the grant was clearly intended to create:

an absolute, hereditary and 'mokurari' tenure, inasmuch as it contains the essential words 'generation to generation', which have always been considered to have that effect. The expression 'the profit or loss is yours' clearly shuts out the idea of enhancement and indicates to show that the rent is fixed in perpetuity.

Apparently the word usually employed in creating a fixed rent in perpetuity is the word "mokurari" though no doubt the absence of such word is not conclusive if other words are found in the grant which clearly show that such a rent was intended to be created.

The learned District Judge, however, took a different view, holding that, taking the pottah as a whole, there was nothing to show that the landlord had precluded himself from claiming an enhancement of rent. This view was maintained by the two Courts of Appellate jurisdiction of the High Court of Judicature at Fort William who heard the case.

Briefly stated, the learned Judges, in their respective Courts were unable to find in the grant any words which have, as the word "mokurari" would have, the effect of indicating that the rent was intended to be fixed in perpetuity. On the contrary, they point out that the words following those quoted by the Subordinate Judge, viz.,

and you shall on no account be competent to pray for a reduction of the rent. You shall abide by the survey and settlement of rent to be made by me when necessary,

indicate that whilst the lessee was precluded from claiming reduction the landlord was specifically maintaining his right to claim enhancement. Their Lordships agree with the opinions expressed by the Judges of the District Court and the High Court respectively, and are of opinion that on the true construction of the pottah there are no terms used from which it can be inferred that the landlord abandoned his right to enhancement whilst the express provision that the rent would not be reduced seems to negative any such construction. Under the circumstances their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for Appls.—*Watkins & Hunter.*

Solicitors for Respdts.—*W. W. Box & Co.*

* A. I. R. 1927 Privy Council 22

(From Rangoon)

1st November 1926

LORDS ATKINSON AND CARSON AND
SIR JOHN WALLIS.*Ma Mi and another—Appellants.*

v.

Kallander Ammal—Respondent.

Privy Council Appeal No. 95 of 1925.

(a) *Mussalman Wakf Validating Act (1913),
S. 2—Wakf—Definition is not exhaustive.*

The definition of "wakf" as given in the Act is not necessarily exhaustive. [P. 22, C. 2]

* (b) *Mahomedan Law—Gift to wife—Mutation of wife's name effected—Possession of husband will be presumed to be on behalf of wife.*In the case of a gift of immovable property by a Mahomedan husband to his wife, once mutation of names has been proved, the natural presumption arising from the relation of husband and wife existing between them is that the husband's subsequent acts with reference to the property were done on his wife's behalf and not on his own: 1 Bom. H. C. 157 and 13 Bom. 352, *Rel. on.* [P. 24, C. 1](c) *Transfer of Property Act, S. 1—Extension of Act—Local Government has no power to extend a particular provision so as to give it an effect not contemplated by the Act.*

The power to extend any part of the Act to a Province to which it did not apply does not authorize the Local Government to extend particular sections of the Act so as to give those sections a different operation from that which they had in the Act itself read as a whole, for example, to abrogate, in the area to which the extension applied, a rule of Mahomedan Law till then in force there as to which the Legislature had expressly provided that it was to remain unaffected by the Act. [P. 23, C. 1]

*G. R. Loundes and R. U. Leach—for Appellants.**E. B. Raikes—for Respondent.*

Sir John Wallis.—The question whether Kallander Ammal, the plaintiff in this suit, was divorced in the year 1918 by her husband Shaik Moideen, now deceased, and so lost her rights of inheritance in his estate, is dealt with in the appeal which came before this Board in the principal suit brought by her against the present first and second defendants, who claim to have succeeded to the estate of the deceased as his widow and son. In the present suit the plaintiff seeks to recover from them certain lands in Burma of the estimated value of Rs. 6,000, conveyed to her by her late husband by a registered deed of gift dated the 20th July 1924, which

provided that out of the income remaining after the payment of the Government revenue she was to expend Rs. 450 every year for the charitable purposes mentioned in the schedule and to enjoy the balance; and that after her death her heirs were to continue the annual payments of Rs. 450 and to divide the balance according to the Mahomedan Law. The defendants pleaded that the gift was invalid according to Mahomedan Law as the donor had never put the donee in possession, but had remained in possession until his death, and also that the gift had been revoked by the donor by a registered deed dated the 20th August 1919. The District Judge held that the gift was not complete without possession, even if it should be regarded as a wakf, and that on the evidence possession had not been proved and dismissed the suit. The plaintiff appealed to the High Court, and Young, J., who delivered the principal judgment, began by considering the question whether the deed was a wakf-nama, constituting a wakf within the meaning of the Wakf Act of 1913, or a mere deed of gift coupled with a trust. In the view their Lordships take of this case this question is immaterial, and they will merely observe that that is a definition for the purposes of the Act and not necessarily exhaustive, and that the question, when it arises, cannot be considered exclusively with reference to it.

The learned Judge next dealt with the question of possession, and observed that all the older High Courts were agreed before the passing of the Transfer of Property Act, 1882, that the rule of Mahomedan Law requiring gifts to be perfected by possession was applicable in India, and that this rule was preserved by S. 129 of the Act, which provided that nothing in the chapter relating to gifts should affect any rule of Mahomedan Law. Notwithstanding this the learned Judge proceeded to hold that in 1914, at the date of the deed, in this part of Burma transfer of possession was not necessary, because the Local Government, in the exercise of the powers conferred upon them by S. 1 of the Transfer of Property Act as amended to extend "the whole or any part of the Act" had only extended S. 123 in this part of the Act and had not extended, S. 129. In their Lordships' opinion this view is

based on a serious misconception. The power to extend any part of the Act to Burma did not authorize the Local Government to extend particular sections of the Act, so as to give those sections a different operation from that which they had in the Act itself read as a whole and to abrogate in the area to which the extension applied a rule of Mahomedan Law till then in force there as to which the Legislature had expressly provided that it was to remain unaffected by the Act. Nor is there any reason to suppose that the Local Government purported to do anything of the kind. The notification, which has been read to their Lordships, was intended to render registration and attestation compulsory in the case of transfers of immovable property by sale, mortgage, lease or gift as provided in the Act, and effected this by applying the different sections of the Act making registration compulsory in the case of these different kinds of transfers. The section relating to gifts was S. 123, which provides that:

For the purpose of making a gift of immovable property the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses,

and there is no reason to suppose that the Local Government intended to do more in the case of gifts by Mahomedans than to make such registration and attestation compulsory.

Having thus, erroneously, in their Lordships' opinion, held that transfer of possession was unnecessary, the learned Judge proceeded to consider a question which was not directly raised on the pleadings, whether the gift was bad for want of acceptance by the donee, and held that it was not, a finding which has not been questioned before their Lordships.

Arguments have been addressed to their Lordships on the questions dealt with in the judgment of the trial Judge, whether this deed created a wakf, and, if so, whether according to the Hanafi School, wakfs form an exception to the ordinary rule of Mahomedan Law, which requires gifts to be perfected by possession and undoubtedly applies to wakfs among Shiahhs. Their Lordships do not consider it necessary to consider these questions, because they are of opinion, differing from the trial Judge, that possession is sufficiently proved to

have been given, and that is sufficient to dispose of the case. If the wakf was perfected by transfer of possession, it has not been contended that the donor had any power to revoke it as he purported to do.

Their Lordships will now proceed to give their reasons for holding possession sufficiently proved. The plaintiff and her husband Shaik Moideen were Lubbais, that is to say, they belonged to a section of the Mahomedan community in the Madras Presidency who retain the vernacular and many of the customs of their Hindu ancestors, and are extensively engaged in trade, both in India and abroad. Shaik Moideen, after his marriage to the plaintiff forty or fifty years ago, lived with her for some time at Nagore in the Tanjore district, and then went across the sea to Burma and began to carry on business there as a money-lender, leaving his wife behind at the home in Nagore. He was very successful, and became possessed of considerable property, moveable and immovable; and while his relations with the plaintiff remained friendly, his visits to her at Nagore took place at longer intervals, and of late years had almost entirely ceased. He married a second wife in Burma, who predeceased him, and for many years before his death he had living with him in his house at Tawa, Ma Mi and Mahommed Eusoof, the first and second defendants in this suit, who claim to be his wife and son, and as such, on his death, took possession of the property left by him in Burma.

In 1914, when he was getting on in years, he was minded to found certain charities in Nagore, and appears to have decided that the best way to do so was to convey some of the lands he had acquired in Burma to his wife in Nagore and her heirs on trust to expend Rs. 450 in each year out of the annual income in Nagore on the charities mentioned in the schedule.

There is no reason for supposing that he was not desirous of founding the charity there and then, and it was only natural that he should have been anxious to perfect the gift by delivering possession so as to put it out of the power of those who came after him to question it. Accordingly, we find that mutation of names was duly effected in the public records and the plaintiff entered as

proprietress. The District Judge, however, has observed that the plaintiff has not proved that the mutation was effected at the instance of the donor, Shaik Moideen. It appears to their Lordships that it was not to be expected that the plaintiff, who was far away at the time in Madras, should have been able to obtain direct evidence of this so many years after, and that it was not necessary for her to do so. The reasonable presumption is that such a mutation of names would not have been made except on the application of one of the parties to the deed, in this case the donor, who was on the spot. As for the District Judge's alternative suggestion that the mutation may have been made by the Land Records Department from a copy sent to them of the registered deed of gift without notice to the deceased, nothing has been urged before their Lordships in its favour, and it appears to be negatived by the fact that the plaintiff's address is not taken from the deed of gift, which gives her Nagore address, but is entered as "Railway Station, Tawa," her husband's address; and also by the fact that in the case of one parcel of land there is an additional entry stating that Shaik Moideen himself was in possession as the plaintiff's agent. It must therefore be taken that mutation was effected by Moideen himself, and in the case of a gift of immovable property by a Mahomedan husband to his wife, once mutation of names has been proved the natural presumption arising from the relation of husband and wife existing between them is that the husband's subsequent acts with reference to the property were done on his wife's behalf and not on his own as held in *Amini Bibi v. Khatija Bibi* (1) and in *Emnabai v. Hajirabai* (2).

It follows, therefore that the questions so much debated at the trial whether Shaik Moideen retained the deed of gift in his own custody or gave it to the plaintiff, and what became of it after his death, throw little light upon the case, and may be disregarded. That Shaik Moideen, whilst retaining the management of the lands in his own hands, regarded the plaintiff as being in possession, is shown by the admitted fact that in 1917 he got her to execute

and register a power of attorney in favour of Mahommed Kassim, authorizing him to manage the lands, and had the power sent to himself in Burma. It is then said truly for the defendants that he did not give the power to Mahommed Kassim, who was then a boy of fifteen living in his house and treated as an adopted son—there is no legal adoption among Mahomedans—or ever hand over the management to him; but there is nothing surprising in this. The natural explanation is that the creation of the power was a precautionary measure, and that Shaik Moideen was anxious to have it ready to hand over to one in whom he had confidence in the event of his becoming unable to manage himself; and he would probably have done so if he had not subsequently changed his mind and purported to revoke the deed of gift. With reference to the argument that Moideen executed other deeds of gift in favour of Kassim and others, in which possession was never given, it may be observed in the case of Mahomedans who have very restricted powers of testamentary disposition, the execution of such deeds with postponement of possession may well take the place of revocable legacies, the transfer of possession being dependent on the future conduct of the donees, but that no such reasons for postponement existed as regards a charity of this kind.

Further, the plaintiff was clearly treated by Shaik Moideen himself as having been in possession and in receipt of the income of the lands when in 1919 he purported to revoke the deed of gift on the grounds that she had failed to utilize the properties handed over to her for charity, and stated that he himself would so utilize them in future. This is strong corroboration of the plaintiff's own evidence that her husband was in the habit of remitting moneys to her for the performance of the charities, which must, in the circumstances, be presumed to have come from the income collected by him on her behalf from the lands which he continued to manage. The plaintiff says the money was sent to her by money orders and by other methods of remitting moneys to India which are not unusual with persons in the position of the deceased. It is not surprising that the money orders are not now forthcoming, but there is one telegraphic

(1) 1 B. H. C. 157.

(2) [1889] 13 Bom. 352.

order sent by Shaik Moideen for Rs. 75 for subrat, one of the scheduled charities, which the District Judge has omitted to notice. No doubt the accounts of receipt and expenditure put forward by those in charge of the plaintiff's case do not carry conviction and have been rightly rejected. Like the stories that Mahomed Kassim had been in management under the power, and that the plaintiff had herself leased out the charity lands to tenants, they are only another instance of the ill-judged attempts which are so often made in cases of this kind to improve a litigant's case by manufacture of evidence, but they do not affect the inferences in the plaintiff's favour arising from the admitted and clearly-established facts of the case.

Their Lordships are therefore of opinion, though for different reasons, that the High Court was right in giving the plaintiff a decree, and that the appeal should be dismissed with costs; and they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for Appellants—*Waterhouse & Co.*

Solicitors for Respondent—*T. L. Wilson & Co.*

* A. I. R. 1927 Privy Council 25

(From Lahore : A. I. R. 1924 Lah. 582

9th November 1926 :

LORDS PHILLIMORE, SINHA, BLANESBURGH AND SALVESEN

Fitzholmes and another—Appellants.

v.

Bank of Upper India Ltd., in Liquidation—Respondents.

Privy Council Appeal No. 4 of 1926.

* *Limitation Act, Art. 181—Mortgage suit—Preliminary decree appealed from—Time for applying for final decree runs from appellate decree though it confirms the lower Court's decree—Civil P. C., O. 34, R. 5 (2).*

Where there has been an appeal from a preliminary mortgage decree and the appellate Court has not extended the time for payment, the period of three years within which, under Art. 181, an application for a final decree under O. 34, R. 5, Sub-R. 2, must be made, runs from the date of the decree of the appellate Court, not from the expiry of the time for payment, fixed by the preliminary decree, even when the appellate

Court has confirmed the decree of the lower Court.

Where before the date of the appellate Court's decision the three years and six months had passed and therefore it was contended that decree was dead before the appellate Court gave its decision and could not be revived :

Held : that when an appellant appeals, unless there is some rule dismissing the appeal by appellate Court for want of time or an order is procured dismissing it, his appeal stands till it is heard : A. I. R. 1926 P. C. 93, *Rel. on.*

[P. 25, C. 2, P. 26, C. 1

A. M. Dunne and B. Dute—for Appellants.

George Loundes and W. Wallach—for Respondents.

Lord Phillimore.—Their Lordships need not trouble counsel for the respondents.

The cases under appeal were two : one against husband and wife, and one against wife only, in respect of mortgages to the respondent bank. Decrees fixing a figure to be paid and giving six months within which it should be paid were passed in both suits, on 21st August 1919, in one, and on 17th December 1919, in the other. The mortgagors appealed and somehow or other the proceedings got so delayed that the judgment of the High Court in both of the suits was not passed till the 7th March 1923, when the High Court dismissed both appeals. On the 13th March, the bank applied for a final decree. Objection was taken by the mortgagors that six months had not expired since the decree of the High Court, and that objection prevailed. Thereupon the bank waited for six months and a little more, and on the 10th October applied for a final decree for sale, and an order was made on 20th October. Thereupon the mortgagors appealed to the High Court, on the ground that, under Art. 181 of the Limitation Act, the decrees of the Court of first instance were dead. They passed by the decrees of the High Court and contended that there could now be no sale. The District Judge dismissed this application and the High Court agreed with him; but the mortgagors, not being content, have appealed to this Board. It has now been definitely settled in the case of *Jowad Hussain v. Gendan Singh* (1) that

Where there has been an appeal from a preliminary mortgage decree under O. 34, R. 4, 'sub R. 1, and the appellate Court has not extended the time for payment, the period of three years

(1) A. I. R. 1926 P. C. 93.

within which, under the Indian Limitation Act, 1908, Sch. 1, Art. 181, an application for a final decree under O. 34, R. 5, sub-R. 2, must be made runs from the date of the decree of the appellate Court, not from the expiry of the time for payment fixed by the preliminary decree.

Therefore, in the first instance, it would seem quite simple that the mortgagors' point was a bad one. But a very ingenious suggestion was made with regard to the earlier of the two decrees. It was said that before the date of the High Court decision the three years and six months had passed and therefore that decree was dead before the High Court gave its decision and could not be revived, so no order for sale could be made. The point does not seem to have been taken in the Courts below, but it is open to the appellants to raise it. The answer is first, that no attempt has been made to discharge the order of the High Court. It stands unappealed from. The answer is next, that the jurisdiction of the High Court is not touched by the Limitation Act, and when an appellant appeals to the High Court, unless there is some rule dismissing the appeal for want of time or an order is procured dismissing it, his appeal stands till it is heard. Therefore the High Court had a right to determine the appeal, and when the judgment of the High Court is given, though in form it affirms the decree of the Judge of first instance, it works out at a different figure, because the amount of interest is not at the same figure that judgment was passed for in the first instance. Therefore the High Court having jurisdiction to pass its decrees, those decrees were sought to be enforced in plenty of time. The mortgagors were right in their objection that these decrees should not be enforced till six months had elapsed from the judgment of the High Court, and it is sufficiently cynical that they should now turn round and take a point which one is glad to think entirely fails.

These appeals will be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

Appeals dismissed.

Solicitor for Appellant—*H. S. L. Polak.*
Solicitors for Respondents—*T. L. Wilson & Co.*

A. I. R. 1927 Privy Council 26

(From Lahore: A. I. R. 1927 Lah. 221)

11th November 1926:

VISCOUNT HALDANE, LORDS SUMNER
AND SINHA

Madat Khan and another—Appellants.

v.

King-Emperor—Opposite Party.

Privy Council Appeal No. 72 of 1926.

* *Criminal P. C., S. 537—Two factions fighting—Factions separately tried—Evidence similar in both—Independent evidence sufficient for conviction—Disposal in one judgment by appellate Court caused no injustice and hence should be upheld.*

Two parties were charged for their attacks on each other in the same occurrence, and the charges were tried separately at two distinct trials. The evidence given for the prosecution was similar to a substantial extent in each case. Each party was a witness against the other but there was also independent evidence. Although they were tried separately, the High Court gave one judgment, but treated the cases as two cases which has been separately tried. There was, however, a body of separate evidence which was applicable to each case, and that in itself was enough for the conviction.

Held: that, although technically, it might have been better to keep the evidence entirely distinct and to have delivered two separate judgments, no injustice has followed from what was done. [P. 26, C. 2, P. 27, C. 1]

W. W. Wallach—for Appellants.

A. M. Dunne and Kenworthy Brown—for the Crown.

Facts appear fully in A. I. R. 1926 Lah. 221.

Viscount Haldane.—In this case their Lordships advised His Majesty that special leave to appeal should be granted, because of the apprehension that it might turn out that evidence which was given in one trial had been improperly imported into a quite separate trial. Now that the case has been fully and fairly put by Mr. Wallach on its merits, it turns out that the apprehension was not well founded.

Two parties were charged for their attacks on each other in the same occurrence, and the charges were tried separately at two distinct trials. But naturally, as the occurrences were common to both cases, the evidence given for the prosecution was similar to a substantial extent in each case. Each party no doubt was a witness against the other; but, on the other hand, there was also independent evidence. In a case of that kind it is almost impossible to keep the cases wholly separate. Although they were tried separately, the

High Court gave one judgment, but treated the cases as two cases which had been separately tried. It is said that they imported considerations from one case into the other. When one looks at it, to some extent that was inevitable and to some extent it did so happen. There was, however, a body of separate evidence which was applicable to each case and that in itself was enough for the conviction; so that, although technically it might have been better to keep the evidence entirely distinct, and to have delivered two separate judgments no injustice has followed from what was done. There is no doubt that in substance the learned Judges had material on which to come to the conclusion to which they did come. They have come to a conclusion which in substance appears to their Lordships to be the right one, and it is only on technical grounds that that conclusion could be questioned.

In those circumstances their Lordships see no good reason for advising His Majesty to interfere in this case and the appeal should be dismissed.

Appeal dismissed.

Solicitors for Appellants—S. L. Wilson & Co.

Solicitors for the Crown—The Solicitor, India Office.

* A. I. R. 1927 Privy Council 27

(From Madras)

25th November 1926

LORDS PHILLIMORE, SINHA AND
BLANESBURGH AND MR. AMEER ALI
Kachireddi Nagireddi—Appellant.

v.

Sakireddi Chinna Narayanareddi and
others—Respondents.

Privy Council Appeal No. 166 of 1924.

* (a) *Privy Council*—Considerable evidence both ways—Concurrent finding of fact will not be disturbed.

Where there is considerable evidence both ways, their Lordships would not displace a conclusion of fact upon which both Courts in India have concurred. [P. 30, C. 1]

* (b) *Practice — Evidence — Application to admit, made at a late stage—Applicant must show absence of want of diligence on his part.*

When application is made at a late stage in the case to put in evidence *res noviter*

ad notitiam perventa, one of the primary duties of the applicant is to show that it was owing to no want of diligence on his part that the matter was not discovered before. [P. 31, C. 1]

E. B. Raikes and S. C. Chaudhuri—for Appellant.

L. DeGruyther and K. V. L. Narasimham—for Respondents.

Lord Phillimore.—The appellant in this case, claiming to be the nearest agnate, brought a suit to recover the estate of one Kachireddi Balireddi against Sakireddi Peddasubbareddi, now deceased, of whom the present respondents are representatives.

The deceased defendant denied that the plaintiff was an agnate of Balireddi and further relied upon a will which the said Balireddi had made in his favour. The plaintiff said that Balireddi had made such will and further that he was a minor and incapable of making a will.

The Subordinate Judge decided that the plaintiff had made out his title as agnate, and that the alleged will was not proved. With regard to the question of the majority or minority of Balireddi he held that the burden of proof was upon the defendant who set up the will, and that that burden had not been discharged.

On appeal, the High Court came to the conclusion that the plaintiff had not proved that he was an agnate and was therefore not entitled to maintain the suit.

This was enough to dispose of the case, but the learned Judges proceeded to the questions relating to the will, and they found that the will was genuine, but on the other hand they agreed with the Subordinate Judge in holding that the majority of Balireddi was not proved. Therefore, the genuineness of the will was not material. The High Court dismissed the suit.

The appellant has, if he is to succeed, to prove in the first instance that he was the nearest agnate. If he progresses so far, he has then to meet the contention of the respondents that they can rely upon the will; and their Lordships will proceed to discuss these questions in their logical order.

The plaintiff's case is that he had a grandfather named Kachireddi Bangarureddi, who married one Akkamma and had three sons, Subbareddi, Seshireddi and Balasubbareddi; that he is the son of

the last named, while the deceased was the great-grandson of Subbareddi and therefore the great-great-grandson of Bangarureddi. The descent of the plaintiff and his relationship to Seshireddi are admitted, and the descent of the deceased from Subbareddi is admitted; but it is denied that Subbareddi was the son of Bangarureddi, the case for the defendant being that the father of Subbareddi, who would be the deceased's great-great-grandfather, was one Venkatareddi. The deceased, who, whether major or minor, was certainly young, had been brought up since his father's and mother's death in the house of the defendant, who was his maternal uncle and would therefore have no claim to succeed to his property unless, as he alleged, a will had been made in his favour. Much oral evidence was given on both sides, but the only written evidence consisted in documents relating to certain properties. The deceased died on the 25th May 1918, and the suit was brought on the 18th November following. Previously to this there had been a dispute as to the guardianship of the deceased, both the plaintiff and defendant applying, the plaintiff then alleging that he was the nearest agnate and the defendant then denying this. In the event, the Judge who tried this matter appears to have come to the conclusion that neither was a fit guardian and made no order, and the defendant remained *de facto* guardian. The plaintiff, who was 60 years old when he gave his evidence, had the opportunity of recollecting the family for some time back. In the opinion of the Subordinate Judge, who heard him,

he gave his evidence about the relationship and division and enjoyment of properties in a straightforward manner, and it left a favourable impression in my mind that his evidence about plaintiff relationship was true.

A point was made against the plaintiff that he at first said that his father had no sisters, and then on second thoughts said that he had one named Pullamma, but denied that there was another sister named Guramma.

Now, upon the defendant's story, Guramma was the sister of the deceased grandfather and would therefore be, if the two families were related, the plaintiff's aunt. The plaintiff knew Guramma, but said she was the sister of Kesamma, who was the wife of the deceased's great-grandfather.

There is this piece of documentary evidence as to Guramma that in an award by arbitrators made in June 1896, to which nobody connected with the plaintiff was a party, it was stated that the father of the deceased filed a deposition to the effect that Guramma was his father's paternal aunt, but there is nothing in the award which is consequential on this statement.

With regard to the other witnesses in the case, the Subordinate Judge did not apparently think that much trust could be placed upon them. Many were interested, they were all in a humble position in life with no documents and nothing special to call their attention or fix their memory. Some gave evidence of reputation, the admissibility of which is questioned, and which their Lordships without any definite pronouncement have laid aside. The rest could only speak as to the attendance or non-attendance at funerals and the observance or non-observance of pollution upon the death of a relation. And one at least of the defendant's witnesses, while insisting that the deceased's male ancestor was Venkatareddi, accepted for his wife Akkamma, which was the name of the plaintiff's ancestress.

There was one matter on which the oral testimony was valuable, and that was in relation to certain property. This is a point on which their Lordships will make further observations. That testimony of the Subordinate Judge to the apparent honesty of the plaintiff is of further value because of the charge made against him by the defendant.

In the guardianship matter, the defendant's brother had taken the plaintiff's side and was even a co-petitioner with him, and the defendant's case was that he and his brother had quarrelled, and that the plaintiff was a man of straw and a mere tool of his brother, who had invented the whole case out of spite. This case was clearly disbelieved by the Subordinate Judge.

The other evidence to which the Subordinate Judge attached weight—and in their Lordships' opinion rightly—was on two points. First, it was said that there was an ancestral common house, now divided into three parts, one for each of the descendants of Bangarureddi, the father of the deceased having one, and the plaintiff two parts in virtue of his

father and of his uncle Seshireddi under a partition, to which reference will be made.

The three houses are certainly touching each other, and between the plaintiff's house and Seshireddi's there is nothing but a partition wall. It is not clear whether there are two walls between Seshireddi's former house and the deceased's father's house or whether there is merely a partition wall. There is some difference in the shape of the third house, and its door is now to the west while the doors of the other two houses are to the south. It is said that at one time the third house had a door to the south, but, as the Subordinate Judge says, this third house has been largely altered and re-built since it was sold, and it is not possible to speak definitely. It is not suggested that this block of three is touched by other houses on either side. Without attaching too much weight to the proximity of the houses, there appears to be, as the Subordinate Judge thought, at least a consistency in their occupation with the case of the plaintiff.

The High Court dismissed this part of case rather summarily, relying on the fact that the witnesses described the houses as separate but adjoining. This however, at the time that the witnesses spoke, must on any view have been a correct description.

The plaintiff's stronger point is with regard to certain lands. If, as the plaintiff says, there was a common ancestor, the lands would be found to have been held in common or to have been divided between the three lines, that of the plaintiff's father, the deceased's great-grandfather, and the line of Seshireddi.

Now Seshireddi had no son, but he had a daughter who, if there had been a partition, would succeed to a third share for a Hindu woman's estate; and upon her death Seshireddi's share would be divisible in halves between the line of the plaintiff and the line of the deceased. There were certain properties held under two pattas, one dated 1878 and the other in 1884. The first patta comprises four separate fields, and it was granted to Nagireddi, the deceased's grandfather, Balasubbareddi, the plaintiff's father, and Seshireddi. The second patta was granted to Nagireddi and Balasubbareddi and to Seshireddi's daughter and also to

two Mahomedans. The fact that these two strangers are found as co-holders diminishes the strength of the inference which would otherwise be drawn from the joint tenure, but does not wholly destroy it. The plaintiff says that there must have been—and indeed was—one partition when Seshireddi or his daughter were alive which would be into thirds, and that if you give two fields of which the deceased was in possession to his great-grandfather and leave the other two fields of the first patta and the one field of the second patta to the other two lines, you will get a very nearly equal division—the deceased's line would get 8 acres and 29 cents and each of the other lines would get 8 acres 97½ cents.

The High Court says that this is too uneven; but, as counsel for the appellant has pointed out, if you look at the revenue rather than at the acreage, the division is nearly equal.

Following out this line of argument, the appellant then suggests a second division after the death of the daughter of Seshireddi. Under this arrangement, a third field in Patta No. 1 goes to the deceased's father, the 4th field goes to the plaintiff's branch, and so much of the field in Patta 2 as is not allotted to the Mahomedan tenants is divided as to an area equalling quarter to the deceased's branch and as to three-quarters to the plaintiff's branch, the plaintiff also taking the whole of Seshireddi's house. The acreage here is again not even, because the deceased's branch gets 14 acres and 49 cents and the plaintiff's branch 11 acres and 77 cents. But there are materials upon which one can see that the house was of value and might reasonably form a compensation.

The defendants insist upon the fact that the plaintiff said that his father got the house because he had a larger family and was poor, and because the deceased's ancestor had sold his house or share of house and gone away. But this statement does not seem inconsistent. It would not have been practical to divide the house: one would have to take it and naturally would expect to make compensation in land.

It is true that the land of the second patta is not inherited as in a quarter and three-quarters, but in definite portions, the deceased's branch having one-acre 87 cents and the plaintiff's branch

the rest. But it is remarkable that the patta extends over two survey numbers and each takes a fraction of each. This jointness of holding with no explanation offered other than that of common descent is in, their Lordships' opinion, of considerable weight.

Here again the credibility of the plaintiff becomes important. The case for the defendant was that this was all moonshine, that there had been no partitions, and that his branch had enjoyed their fields and shares as far back as memory went; and witnesses were called on both sides as to this. But the plaintiff, who must have known, deposed positively as to the second partition, and it is with regard to, amongst other things, the division and enjoyment of properties that the Judge said that he gave his evidence in a straightforward manner.

As regards the High Court, it is not as if the learned Judges had come to the conclusion that the defendant's case was right. They founded their judgment upon a perfectly correct ground if it could be maintained that the plaintiff had not given sufficient evidence to prove his case. Their Lordships agree with the Subordinate Judge in holding that he had given sufficient evidence, and that his relationship was proved.

With regard to the defendant's case under the will, the matter stands in this way. It is useless to enquire whether the High Court was right in saying that the will had been executed, or the Subordinate Judge was right in thinking that it was not shown to be a genuine document. If the deceased was not of age at the time that it was supposed to be made, the defendant's case fails.

Now both Courts are in agreement that the majority of the deceased was not proved, and there being considerable evidence both ways, their Lordships would follow their usual rule of not displacing a conclusion of fact upon which both Courts in India had concurred.

But on behalf of the respondents, application had been made for leave to produce further evidence and to put in a register of birth which, if it were a genuine record and related to this particular youth, would be conclusive proof that he was of full age when the will was made. He died on the 25th May 1918, and the will is supposed to have been made two days before, on the

23rd. The age of competency is 18, and it is suggested on behalf of the respondents that he was born on the 17th April 1899.

When the case stood for trial, this issue having been clearly raised, there was produced on behalf of the plaintiff an extract from a register of another village which was said to be that of the birth of this youth there, and at a later date. The names, however, do not wholly correspond and the Subordinate Judge was not able to rely upon it.

The defendant produced no certificate, but he put in evidence two applications which he had made to the tahsildar of the district that a search should be made in the birth register of the village in which the deceased lived and died for the years 1898 and 1899 and for copies of the extract, with a further request that if they were not in the office the tahsildar should summon the karnam of the village and get copies.

The first of these applications was made on the 17th February 1919, and the reply made from the office was that the birth registers were not in the office. A second application for the registers of the three years 1898, 1899 and 1900 was made shortly before the 22nd October 1920, when again the answer was made that the birth registers of the village for the three years were not in the office. The advisers of the defendant took no further step, and the case went to trial without production on his behalf of any birth register.

The defendant gave evidence that he was the village munsif and that he and the karnam used to prepare registers, sign them and send them to the taluk office; that he himself noted in the register the birth of the deceased and that of one of his own sons, who was born a few days after the deceased. In fact, it was because his own wife was expecting her confinement that he could not have the deceased's mother confined in his house. He further said that he could fix his own son's birth because it was on the anniversary of his father's death. He died shortly after the decision in the Court of first instance. After the case had been heard in the High Court and while the appellant was taking steps to bring his appeal before His Majesty in Council, application was made on behalf of the respondents to the High Court to

include in the record what was said to be an extract from the birth register showing that the boy had been born on the 17th day of April 1899, and was consequently of full age. The appellant did not appear upon the application and the order was accordingly made. Thereupon he did take action and filed a counter-petition and affidavit and applied that the original birth register should be sent to England, suggesting that upon inspection it would be found to have been tampered with.

The High Court refused to order the original register to be sent, but their Lordships directed it to be brought, and it has been before them.

They cannot, however, pronounce any opinion upon its genuineness *ex facie*. It is a document kept for European months, with the dates of the month written in European figures. In it on the proper dates, the 17th April and an early day in May, are found the entries of two births, while on the 16th of April there appears another birth which becomes important. The entries were translated to the Board out of the vernacular by the respondents' junior counsel. There is comment to make upon them; and it being the practice to add up the totals for each month, though there is no special place for this purpose, the addition for April corresponds, three boys and two girls.

All that can be said against this is that three entries appear in blacker ink than other entries, and ink a good deal less faded than one would expect.

When, however, application is made at a late stage in the case to put in evidence *res noviter ad notitiam perventa*, one of the primary duties of the applicant is to show that it was owing to no want of diligence on his part that the matter was not discovered before. Here the respondents are in serious difficulty. The applications made on behalf of their father while he was alive to the tahsildar were that he should send certified copies or, if he had not the registers, should send to the karnam and summon him. The answers from the office made no reference to this latter request.

Now the defendant said that he and the karnam acted together, made entries, kept the registers and sent them in due course to the tahsildar. If these registers had not been sent, they would still be with him or with the karnam, and

he had only to produce them, or, if the latter gave trouble, remind the tahsildar of the second branch of his application. If, on the other hand, he knew that they had been sent to and should be in the tahsildar's office, he would not have let the matter rest; he would have issued a subpoena to the record keeper, a step which did produce the register later, as will be stated, or he would have asked for an enquiry, or with less formality (for all were in the same village) he would have talked to the record keeper. The failure to take any of these steps lends colour to the suggestions made for the appellant, that at that time the register either was silent or had entries made in such obviously new ink that it was too dangerous to produce them, at least, till all other means failed.

Then the explanation of the discovery is a strange one. On the 2nd of March 1923 (after the decision in the High Court, but while the present appellant was taking steps to prosecute his appeal to the Privy Council), a suit was brought in the Small Cause District Munsif's Court against the person (his name does not appear) whose birth is apparently recorded the day before the supposed date of the birth of the deceased Balireddi. The suit was on a promissory note, and the defendant pleaded that he was a minor. To prove his majority, a subpoena was issued, the register was forthwith produced, and then the pleader, who happened to be the pleader for the respondents in this cause, saw Balireddi's name and realised its importance. So at least it is said, for the pleader has made no affidavit himself.

Now strange coincidences do occur, but this is a remarkable one. The appellant says that this suit was a sham one, brought to give a reason for the supposed discovery of the register, and that the parties or several of them are connected with the respondents; and his counsel points to the surprising rapidity with which judgment in it was obtained, if it was a really genuine contested suit.

Some explanation also would seem to be required of the contrast between the facility with which the register was acquired in the later case and its non-production on the earlier occasions. The respondents have some answer to this. The first respondent says that the karnam was at enmity with his father,

and that the record keeper has been changed, with an innuendo that his predecessor was also faithless in the discharge of his office. These charges and countercharges might have been examined by the judges of the High Court, to whom it appears that some suggestion of an enquiry was made. Their Lordships cannot deal with them adequately on the materials before them.

But on the whole the circumstances are so suspicious and the burden on the applicants of showing that their father showed due diligence has been so imperfectly discharged, that their Lordships decided not to admit the document. In these circumstances the genuineness or otherwise of the will of the deceased does not call for decision, and the conclusion is that their Lordships will humbly advise His Majesty that the appeal should be allowed, and the judgment of the Subordinate Judge should be restored with costs here and below.

Appeal allowed.

Solicitors for Appellant—*T. L. Wilson & Co.*

Solicitors for Respondents—*H. S. L. Polak.*

* A. I. R. 1927 Privy Council 82

(From Madras: *A. I. R.* 1921 *Mad.* 183)

30th November, 1926

LORDS PHILLIMORE & SINHA, MR. AMEER ALI AND LORD SALVESEN

Panaganti Ramarayaningar—Appellant.

v.

Sri Rajah Velugoti Govinda Krishna Vachendra Bahadur Varu and others—Respondents.

Privy Council Appeal No. 154 of 1924.

* (a) *Transfer of Property Act*, S. 61—Mortgagor must pay off all charges on the mortgaged property in favour of the mortgagee to effect redemption—*Transfer of Property Act*, S. 91.

A deed purported to be a deed of "mortgage with possession" of immovable properties described in Schs. A, B, C and D for a sum of 11 lakhs of rupees with certain rate of interest to be recovered from the rents and profits. If the money was not paid by a certain date, the entire amount then due was to carry interest at 1 per cent. per mensem. At the same time another deed called a counterpart lease was executed by which the mortgagor took a lease from the mort-

gages of the "A" properties for the mortgage period. The lessee was to pay a fixed yearly rent in three equal instalments, which was equivalent to interest on 2-1/2 lakhs at the rate fixed in the mortgage. In default of payment of the rent reserved, the amount was to be recovered from the income of the ijara villages, and by means of the lessee's other property besides the property which was mortgaged with possession.

Out of the sum of 11 lakhs of rupees, the mortgage money was to be applied as follows:

2-1/2 lakhs for payment of mortgage decrees against the "A" properties;

2-1/2 lakhs to satisfy the mortgage decree against the "B" properties; and

6 lakhs to satisfy a mortgage against the "C" properties.

The mortgagee paid off the mortgage decrees against the "A" properties. He also paid into Court a sum of Rs. 1,93,617 in respect of the mortgage decree against the "B" properties. But the properties were sold in execution and the mortgagee lost his possession of the "B" properties. He could not, however, get back the money he had paid into Court till after a certain period.

After some time his widow and representative got back from the Court Rs. 1,80,412-10-0 out of the Rs. 1,93,617-0-0 paid in. He did not receive any interest on the latter sum for the period while it was in Court, nor any interest thereafter on the balance which remained unpaid. The mortgagee did not pay the 6 lakhs of rupees and consequently the "C" properties never came under the operation of the mortgage. The mortgagor remained in possession of the "A" properties under the lease, but did not pay any portion of the stipulated rent.

In a suit for redemption of the "A" properties, held that the mortgage was an anomalous mortgage or at least a combination of a simple mortgage and an usufructuary mortgage.

Held: further, that the two deeds, the mortgage and the lease, should be read together as they formed parts of one transaction. The amount of the arrears of rent under the lease plus interest thereon was a charge on the mortgaged properties and under S. 61 the mortgagor was bound to pay the same for purposes of redemption. The mortgagor was further liable to pay the difference between the amount paid into Court by the mortgagee in respect of the "B" properties and the amount drawn out by him with interest plus the interest on the entire amount of Rs. 1,93,617-0-0 for the period for which it was in Court.

[P 33 C 1, 2; P 34 C 1; P 35 1, 2; P 36 C 1, 2]

* (b) *Transfer of Property Act*, Ss. 61 and 62—S. 62 is not inconsistent with S. 61.

S. 62 applies only to usufructuary mortgages, pure and simple, and is not in any way inconsistent with the provisions of S. 61. [P 36 C 1]

* (c) *Civil P. C.*, O. 34, R. 1—Object.

The object of O. 34, R. 1, is that all claims affecting the equity of redemption should be disposed of in one and the same suit. [P 36 C.2]

W. H. Upjohn and Kenworthy Brown—for Appellant.

Herbert, A. M. Dunne and K. V. L. Narasimham—for Respondents.

Lord Sinha. — This is an appeal against a decree of the High Court of Madras, dated the 19th of April 1920, varying a decree of the Subordinate Judge of North Arcot, dated the 31st March 1917, made in a suit filed in that Court on the 21st December, 1915.

That suit arose out of a transaction between the Raja of Tuni, which was embodied in Exhibit A and Exhibit I in the case.

Ex. A purports to be a deed of "mortgage with possession" of immovable properties described in Schedules A, B, C and D (hereafter called the A, B, C and D properties) for a sum of 11 lakhs of rupees, with interest at 10 annas per cent. per month, to be recovered from the rents and profits. The mortgagor was to have liberty to pay off the mortgage money at the end of four years, with option to defer payment for a further period of two years. If the money was not paid on the 13th of March 1915, the entire amount then due was to carry interest at 1 per cent. per mensem—10 annas from the rents and profits and the remaining 6 annas to be payable by the mortgagor personally being also charged upon the properties.

Ex. I purports to be a muchilka or counterpart lease, by which the mortgagor Raja takes a lease from the mortgagee of the "A" properties for a period of four years, from the 1st July 1909, to the 30th of June 1913. The lessee was to pay a fixed yearly rent of Rs. 18,750, in three equal instalments, which is equivalent to interest on 2½ lakhs at 10 annas per cent. per month. In default of payment of the rent reserved, the amount was to be recovered from the income of the ijara villages, and by means of the lessee's other property "besides" the property which was mortgaged with possession.

There was considerable controversy as to the precise meaning of the Telugu word "gaka" in Ex. I, translated above as "besides." It may mean "in addition to" or "excepting." Their Lordships feel no doubt that in the context that word means "in addition to."

The circumstances under which the transaction embodied in Exs. A and I took place were as follows :

The Raja of Kalahasti was heavily in debt at the time. Decrees for sale had been obtained by mortgagees against the

"A," "B" and "C" properties. The "B" and "C" properties had been actually sold, though proceedings to set aside the sales of the "B" properties were pending. To pay off all these encumbrances and to meet the expenses in connexion with the proceedings to set aside the sales which had already taken place and other immediate necessities, it was necessary for the Raja of Kalahasti (the mortgagor) to raise a sum of 11 lakhs of rupees. That money was to be applied as follows :

(a) 2-1/2 lakhs for payment of three mortgage decrees against the "A" properties and expenses in connexion therewith.

(b) 2-1/2 lakhs to satisfy the mortgage decree against the "B" properties and to meet all expenses in connexion with the proceedings to set aside the auction sales thereof, as also other necessities of the mortgagor, and

(c) 6 lakhs to satisfy a mortgage against the "C" properties in favour of a Sowcar of Hyderabad, who was in possession of those properties with an agreement to reconvey the same on receipt of 6 lakhs of rupees.

The Raja of Tuni agreed to lend this amount of 11 lakhs of rupees and to apply the same for the above purposes on the security of the "A," "B" and "C" properties, with the addition of another small property described in Schedule D of Ex. A, this last, it is suggested, being included merely with a view to registration in the District in which it was situated.

The terms of this agreement were embodied in the two deeds, Ex. A and Ex. I, which were executed and registered on the same date, the 13th March 1909.

Thereafter the mortgagee paid off the three mortgage decrees against the "A" properties and certain other expenses in connexion therewith and the amount so applied was more or less 2½ lakhs of rupees.

He also paid into Court a sum of Rs. 1,93,617 in respect of the mortgage decree against the "B" properties.

These properties (23 villages in Taluk Pamur) had been sold, together with four other villages in the same taluq, in Court auction and the mortgagor had applied to set aside those sales. The first Court confirmed the sales of the four villages and set aside the sales of the "B" villages (23 in number). Both sides appealed to the High Court, which confirmed all the sales (i. e., of all 27 villages) and the mortgagee lost his

possession of the "B" properties. He could not, however, get back the money he had paid into Court, as stated above, till the 24th April 1912, when his widow and representative got back from the Court Rs. 1,80,412-10-0 out of the Rs. 1,93,617 paid in. It is admitted that he did not receive any interest on the latter sum for the period while it was in Court, i. e., until the 24th April 1912, nor any interest thereafter on the balance which remained unpaid, i. e., on the difference Rs. 13,205-6-0.

The mortgagee did not pay the 6 lakhs of rupees to the Hyderabad Sowcar and consequently the "C" properties never came under the operation of the mortgage (Ex. A), and no question arose in the suit with reference thereto.

The mortgagor remained in possession of the "A" properties under the lease (Ex. I), but did not pay any portion of stipulated rent. The mortgagee (lessor) obtained a money decree in respect of seven instalments of the rent, but it is common ground that that decree as well as the remaining five instalments of rent, remained unsatisfied.

The mortgagee died in 1911, and in 1913 his widow and representative transferred all his interest in the mortgaged properties to Defendant No. 1, who thereafter sub-mortgaged it to Defendant No. 2. Defendants 3 and 4 are the representatives of the original mortgagor and mortgagee respectively.

The equity of redemption of the "A" properties was sold in execution of a money decree against the mortgagor and purchased by the plaintiff, who instituted the present suit on the 21st December 1915 against the defendants above described for redemption and possession.

The plaintiff alleged that Defendant No. 1 was claiming a great deal more than the sum (Rs. 2,34,150) which he admitted to be due on the mortgage of the "A" properties; and he asked that an account might be taken of the amount due to the Defendant No. 1 on the security of the properties and that on payment of the same by the plaintiff, the defendants be directed to deliver to the plaintiff the mortgage instruments and all documents in their possession relating to the properties and to deliver possession of the said properties to the plaintiff without any encumbrance and to execute and register an

acknowledgment in writing to the effect that the interest created by the mortgage has been extinguished.

The Defendant No. 1 annexed an account to his written statement under which he claimed that a sum of Rs. 5, 63,172-15-11 was due on the mortgage, including the arrears of rent above mentioned, and he also asked that an account should be taken of all money due to him and the plaintiff declared entitled to redeem only on payment of the whole amount found due, together with his costs of suit.

Now, a portion of the defendant's account consisted of claims for compensation based on several grounds, such as the alleged misdescription of one of the villages mortgaged, the fact that another of the villages was allowed to be sold for arrears of revenue on the alleged fraudulent compromise of the litigation for setting aside the sale of the "B" villages and so forth. These formed the subject of Issues Nos. 7, 8 and 9 in the trial Court and were all decided in favour of the plaintiff. Both the Subordinate Judge and, on appeal, the High Court, held that these were all claims for breach of contract sounding in damages and were not in any way charged upon the property. They therefore held that the plaintiff, as assignee of the equity of redemption, could not be required to pay such damages as a condition of redemption. Some of these claims were repeated in the case for the appellant-defendant before this Board, but as Mr. Upjohn, on behalf of the appellant, abandoned them at the hearing their Lordships need not deal with them except in connexion with the question of the costs of this appeal.

The questions remaining for consideration are: 1st, Is the defendant entitled to credit in the mortgage account taken in this suit for the amounts he paid in connexion with "B" properties and, if so, at what rate and for what period is he entitled to interest thereon? And 2nd, Is the defendant similarly entitled to credit for the arrears of rent remaining unpaid in respect of the "A" properties? These formed the subject of Issues Nos. 4, 5 and 12 in the first Court, which decided them all against the defendant.

That Court held as a matter of construction that Ex. A amounted to three

different mortgages for three different amounts on three distinct properties, and that the mortgage for 2½ lakhs on the "A" properties was distinct and separate from the other two items of 2½ lakhs and 6 lakhs, which were similarly received for the respective purposes of relieving the "B" and "C" properties from the encumbrances subsisting thereon. In that view the Subordinate Judge disallowed the claims in connexion with the "B" properties and went to the length of splitting up the stamp duty on Ex. A, allotting half of it only, viz., Rs. 6,000 out of Rs. 12,000, to the claim against the "A" properties.

On the second point, he held that the mortgage (Ex. A) and the lease (Ex. I) were separate and severable transactions, that the arrears of rent payable under Ex. I were not charged upon the "A" properties, either as to principal or interest, and that the plaintiff was not bound to pay the sums claimed in respect of such arrears.

Taking the account on this basis, the Subordinate Judge decreed that (1):

if the plaintiff pays into Court on or before the 30th June 1917, the amount declared due, viz., Rs. 2,70,752-1-9, the defendants should deliver up to the plaintiff . . . all documents in his possession or power relating to the mortgaged property and should, if so required, re-transfer the property to the plaintiff free from the mortgage and from all encumbrances, etc., and shall put the plaintiff in possession of the property, and (2) that if such payment was not made on or before the 30th June 1917, the said mortgaged property should be sold.

The defendant appealed to the High Court. The learned Judges in that Court, differing from the Subordinate Judge, held as a matter of construction that Ex. A could not be treated as creating three distinct mortgages and that there was nothing in its provisions to cut down the plain words of the instrument by which the properties in the four schedules were charged in respect of the whole debt. They, therefore, modified the decree of the first Court by including in the mortgage debt the difference between the amount paid into Court by the mortgagee in respect of the "B" properties and the amount drawn out by him viz., Rs. 13,204-6-0, with interest thereon at 10 annas per cent. per mensem from the 31st January 1911, up to 19th April 1920 (date of High Court decree). They further modified the lower Court's decree by giving to the defendant the

whole of the Rs. 12,000 for stamps, etc.—the additional sums thus allowed amounted, with interest, to Rs. 29,711-8-2.

The only objection to this part of the High Court's decree urged before this Board is that the appellant is entitled to interest on the entire amount paid into Court by the mortgagee (Rs. 19,3,617) from the time he lost possession of the "B" properties, i. e., to the 24th April 1912, at 10 annas per cent. per month, in addition to the interest on the difference (Rs. 13,204) allowed by the High Court. Their Lordships are of opinion that this contention is well founded and the High Court decree must be varied so as to give effect to it.

A second claim urged on behalf of the defendant - appellant to a sum of Rs. 5,572-14-8, is based on the ground that the mortgagor had collected a portion of the rents of the "A" properties between the 13th March 1909, and the 30th June, 1909, and that this portion amounting to Rs. 5,572-14-8 was payable under Ex. A to the mortgagee. The Subordinate Judge, as well as the learned Judges of the High Court, found against the defendant-appellant in respect of this claim and their Lordships see no reason to disturb this concurrent finding of fact.

A more important point in the case relates to the arrears of rent payable under the lease (Ex. I). As stated above, the mortgagor never paid any of the instalments of rent payable under the lease (Ex. A). For seven of these instalments a decree was obtained in O. S. No. 17 of 1912 and a small sum of money realized in execution of that decree; the remaining five instalments also remained unpaid and the defendant claimed that two sums of Rs. 30,997-14-1 and Rs. 38,684-11-0 remained due in respect of these arrears of rent with interest thereon. Their Lordships understand that there is no dispute as to the amount, but the plaintiff contends that these sums are not in any way charged upon the "A" properties and that he was not bound to pay the same for the purposes of redemption.

The Subordinate Judge decided in favour of the plaintiff on the ground that the lease (Ex. I) did not create any charge on the corpus of the "A" properties. The High Court upheld that part of his decision, but on different grounds. The learned Chief Justice (the other learned Judge not dissenting) rejected the Subor-

36 Privy Council RAMRAYANINGAR v. MAHARAJA, VENKATAGIRI (Lord Sinha) 1927

dinate Judge's construction of the lease and held that the annual payments thereby provided were charged on the land in question by Ex. I. The Chief Justice held, however, that by virtue of S. 62, Cl. (b), of the Transfer of Property Act, the plaintiff had a statutory right to redeem the usufructuary mortgage created by Ex. A without paying off the charge for arrears of rent under Ex. I. Mr. Justice Sheshagiri Ayyar agreed with the Chief Justice and was further of opinion that apart from S. 62, Cl. (b), on which the Chief Justice relied, the defendant's claim on this head failed because there was no right in Indian law in a mortgagee to require all the mortgages on a property to be redeemed together.

It is contended before this Board on behalf of the defendant-appellant that the two deeds Exhibits A and I should be read together as they form parts of one transaction, the lease being in the nature of machinery for the purpose of realizing the interest due on the mortgage. Further, that S. 62 of the Transfer of Property Act has no application to the case as it applies only to a case of a usufructuary mortgage pure and simple, which Ex. A is not, as it contains covenants for payment both of principal and interest. The section which the appellant's counsel urges as being applicable to the facts of this case is S. 61 of the Transfer of Property Act, which enacts by implication that a mortgagor seeking to redeem shall not be entitled to do so without paying any money that may be due under a separate mortgage or charge, if the latter relates to the same property.

Their Lordships are of opinion that these contentions on behalf of the appellant must prevail. A number of authorities on the sections of the Transfer of Property Act were cited which their Lordships have considered, but upon which they think it unnecessary to comment. In their Lordships' view S. 62 of the Transfer of Property Act applies only to usufructuary mortgages pure and simple and is not in any way inconsistent with the provisions of S. 61.

The mortgage in question, Ex. A, no doubt is usufructuary, but it is something more, inasmuch as it contains covenants on the part of the mortgagor to pay both principal and interest. Their Lordships are disposed to agree in the view taken of the mortgage by the

learned Chief Justice of Madras that it was an anomalous mortgage or at least a combination of a simple mortgage and an usufructuary mortgage. In no other view could the preliminary decree of the Subordinate Judge directing a sale of the property in default of payment, or the final decree of the High Court which embodies such direction, be made. If, again, apart from the usufructuary mortgage there is a simple mortgage or a charge subsisting on the properties in favour of the defendant by virtue of Ex. I, the decrees both of the Subordinate Judge and of the High Court must be held to be erroneous in so far as they direct that on payment of the amount due under Ex. A the defendant should deliver possession of the property free from encumbrance and all documents relating to the mortgaged property. Counsel, on behalf of the first respondent, conceded that that portion of the decree should be set aside, but urged that the plaintiff should be relegated to a separate suit to enforce the simple mortgage or charge under Ex. I.

It seems to their Lordships that the course suggested by the first respondent's counsel would lead to a circuitry of action and would be contrary to the provisions of O. 34, R. 1, of the Code of Civil Procedure, which requires all persons having an interest in the mortgage, security to be joined as parties to any suit relating to the mortgage. The object of that provision is that all claims affecting the equity of redemption should be disposed of in one and the same suit. If the defendant did not set up his charge for the arrears of rent in this suit serious questions might well arise as to whether he would be entitled subsequently to bring a suit to enforce that charge. Their Lordships are of opinion that the defendant-appellant is entitled to add the sums in question to his claim in this suit, with interest thereon, from the due date of the mortgage, viz., 13th of March 1915.

The judgment of the High Court should be varied on the points mentioned above and the case remitted to that Court in order to make a decree on the above basis, and their Lordships will humbly advise His Majesty accordingly.

The Respondent No. 1 must pay the appellant's costs of this appeal, less a

sum of £ 50, which their Lordships assess as being payable to him by the appellant in respect of unsustainable claims abandoned only at the hearing of this appeal.

Appeal allowed.

Solicitors for Appellant—*Douglas, Grant and Dold.*

Solicitors for Respondents—*H. S. L. Polak.*

* * A. I. R. 1927 Privy Council 37

(From Allahabad)

10th December 1926

LORDS PHILLIMORE, BLANESBURGH AND SALVESEN AND SIR JOHN WALLIS

Sri Krishn Das and others—Appellants.

v.

Nathu Ram and another—Respondents.

Privy Council Appeal No. 183 of 1924 : Allahabad Appeal No. 36 of 1921.

* * *Hindu Law—Joint family—Alienation by father—Suit to set aside—Necessity as to a portion of consideration not proved—Question is whether the sale as a whole was for legal necessity—Where sale is for necessity, whole amount will be presumed to have been expended for family benefit—Bona fide purchaser after due enquiry is not bound to return money not spent for necessity to members challenging sale : 86 I. C. 91=A. I. R. 1925 All. 324=47 All. 355, Overruled.*

The statement that, "where a father has sold ancestral property for the discharge of his debts, if the application of the bulk of the proceeds is accounted for the fact that a small part is not accounted for will not invalidate the sale," although in itself a correct statement of the law, is not a complete statement of the law; a sale will not necessarily be invalidated wherever the part of the consideration not accounted for cannot be described as small.

The true question which falls to be answered in such cases is whether the sale itself was one which was justified by legal necessity. This is the point of view from which the matter should be approached.

Where the sale has been held to be justified, but there is no evidence as to the application of a portion of the consideration, a presumption arises that it has been expended for proper purposes, and for the benefit of the family.

Where the purchaser acts in good faith and after due enquiry, and is able to show that the sale itself was justified by legal necessity, he is under no obligation to enquire into the application of any surplus and is, therefore, not bound to make repayment of such surplus to the members of the family challenging the sale; 6 M. I. A. 393 (P. C.) ; (1864) W. R. 385 ; (1867) 8 W. R. 75, Rel. on ; 25 All. 330 and 27 All. 491, Disapproved.

86 I. C. 91=A. I. R. 1925 All. 324=47 All. 355, Overruled.

Where the sale challenged was made after due enquiry as to the legal necessity by the vendee, such necessity had been proved by him to the extent of Rs. 3,000 out of a total price of Rs. 3,500 and sale was for an adequate consideration :

Held : that the mere fact that after a long interval of time the purchaser had not been able to establish how the surplus of Rs. 500 was applied is not a sufficient ground in law for setting aside the sale. [P. 39, C. 1, 2, P. 41, C. 1]

B. Dube—for Appellant.

S. Hyam—for Respondents.

Lord Salvesen.—This is an appeal from a judgment and decree dated 30th March 1921, of the High Court of Judicature at Allahabad which on second appeal reversed a judgment and decree dated the 1st February 1919, of the Additional District Judge of Aligarh who had set aside a judgment and decree dated 30th August 1918 of the Subordinate Judge of Aligarh.

The petition of plaint was at the instance of Nathu Ram and his brothers, sons of one Dungar Mal and was directed against Kanhaiya Mal who had purchased ancestral property from the plaintiffs' father in the year 1902, and the main relief sought was that the sale deed dated 23rd December in that year should be declared invalid, and the plaintiffs awarded proprietary possession of the property thus alienated by their father. The property sold consisted of :

1. One moiety share in a 6 biswa, 5 biswansi zamindari share of a property in mauza Daulatpur.

2. A proportionate share in 51 bighas, 18 biswas, 13 biswansis "pukhta" of a zamindari property in the same mauza, both situated in the district of Aligarh.

The plaintiffs were members of a Hindu joint family of which their father Dungar Mal was manager, and were minors at the date of the sale deed, and the eldest of them only attained majority some short time before the suit was brought. The plaintiffs' father, Dungar Mal, was made a party to the action, but did not defend. He was alive at the date of the trial, but has since died.

The facts found by the District Judge of Aligarh, which are admittedly conclusive, may be summarised as follows :

1. The sale deed in favour of the Defendant No. 1's father was executed in December 1902, and the consideration therein stated of Rs. 3,500 was paid in cash.

2. The property in question had been previously sold by auction, but on the 5th January 1902, Dungar Mal paid Rs. 1,300 to get this sale set aside, and shortly before that he had spent a sum of about Rs. 4,000 on his sister's wedding.

3. In order to meet part of his indebtedness thus incurred Dungar Mal had borrowed on promissory notes from Kewal Ram a money-lender, two sums of Rs. 1,000 and Rs. 1,600.

4. These two sums, with interest, bringing the total up to Rs. 3,000, were discharged out of the consideration money paid by the vendee, and the promissory notes delivered up.

5. Before purchasing the property from the Hindu father the vendee ascertained the facts above mentioned.

6. There was no evidence as to how Dungar Mal applied the Rs. 500, the balance of the purchase price, and he did not tender himself as a witness.

7. The Additional Judge accepted the conclusion of the Subordinate Judge that the sale was made for adequate consideration, and indeed, that the seller got a good price for it.

8. He appears also to have accepted the view of the Subordinate Judge that there was no truth in the allegations made by the plaintiffs against their father as to his leading an immoral life, but that there were grounds for holding that the suit had been instigated by him.

9. During the sixteen years preceding the action the vendee spent large sums on the improvement of the property, the value of which at the date of the suit now exceeds Rs. 10,000. On these facts the Additional Judge held in law that the sale was executed "for legal necessity" and, therefore, the transaction was one which the plaintiffs cannot set aside. He accordingly dismissed the suit with costs.

The plaintiffs appealed to the High Court, the main, if not the only ground of their appeal being that the sum of Rs. 500 had not been applied in payment of debts for which the property sold could have been charged. This argument prevailed. In their judgment the learned judges said :

It is difficult to decide cases of this nature upon any fixed principle. It has been held by their Lordships of the Privy Council that in cases where the father has sold ancestral property for the discharge of his debts if the application of the bulk of the proceeds has been satisfactorily accounted for the fact that a small part is not accounted for will not invalidate the sale. That principle has been followed in numerous cases. The difficulty always is to ascertain what amount, in cases like this is the bulk of the purchase money.

After referring to two Allahabad cases to which more particular reference will afterwards be made, the learned Judges go on to say :

We have, therefore, to deal with each case on its merits, and to decide whether in a particular instance the amount for which the legal necessity has not been proved is with regard to the whole consideration what may be described as a trifling sum. In the present case it is shown that out of Rs. 3,500 only Rs. 3,000 represented

the money which was taken for legal necessity. We should find it difficult, having regard to the decisions of this Court, to hold that Rs. 500 is in this instance a trifling amount, and we think, therefore, that we ought to follow the line which was taken in the two Allahabad cases above referred to.

They accordingly gave the plaintiffs a conditional decree by which they were declared entitled on payment of Rs. 3,000 within six months from the date of the decree, to have the sale set aside, and the property returned by the Defendant 1.

The two decisions referred to by the learned Judges, and which were treated as binding by them are those of *Gobind Singh v. Baldeo Singh* (1), and *Ram Dei Kunwar v. Abu Jafar* (2). In the former of these cases on a suit to set aside the sale of family property, it was found that out of the total consideration of Rs. 3,299-8, a sum of Rs. 2,923-8 represented money which had been applied for purposes of legal necessity. In the second case it was found that Rs. 2,550 out of the total consideration of Rs. 2,995 represented money taken for legal necessity. In both cases conditional decrees setting aside the sales were passed on payment of the sums which were found to have been applied for purposes of legal necessity. Considering, therefore, the matter simply as one of arithmetical calculation the decision in the present case may be said to have followed upon these, and so from the point of view of the learned Judges, who decided the present case, to have been sufficiently justified.

The appellants, however, contended that the two decisions founded on were wrongly decided, and as they are not binding upon their Lordships' Board their argument involves a review of the whole authorities with a view to ascertaining the correct principles on which similar questions to those raised in the present suit ought to be decided. In view of the diversity of opinion in the various presidencies of India, their Lordships consider that they are bound to accede to this demand, and not the less so because even in Allahabad a recent judgment of the High Court, which is printed as part of the record, appears to be at variance with the three preceding judgments. In that case the Court of

(1) [1903] 25 All. 330=(1903) A. W. N. 57.

(2) [1905] 27 All. 494=(1905) A. W. N. 63.

first instance had found that out of the entire consideration of Rs. 1,500 a sum of Rs. 967 only represented debts binding upon the family property. It was held that to the extent of the balance of Rs. 532 no legal necessity was established. The District Judge differing from the trial Court, held that the sale should be sustained; that there were binding debts to the extent of Rs. 1,196 and that as the bulk of the purchase money went to satisfy these debts the plaintiffs had no right to cancellation of the sale. This judgment was affirmed by the High Court, although the difference between the purchase money and the debts which were found to create the legal necessity was much greater proportionally than in the present case or in the two cases on which reliance was placed above referred to. The ground of differentiation was that the property sold was a moiety share of a fixed rate tenancy over which there also extended a mortgage, and that in such circumstances

it is not always possible for the father of a family to sell just that share of the property which will bring in the precise sum which is wanted to clear the debts which are binding.

These two considerations apply equally in the present case:

In their decision the learned Judges of the High Court rely on the authority of the case of *Girdharee Lal v. Kanta Lal* (3), and especially on the headnote which contains this passage:

Where a father has sold ancestral property for the discharge of his debts, if the application of the bulk of the proceeds is accounted for the fact that a small part is not accounted for will not invalidate the sale.

While this is in itself a correct statement of the law so far as it goes, it does not by any means follow, as the learned High Court judges seem to have thought that it is a complete statement of the law or that the sale will be invalidated wherever the part of the consideration not accounted for cannot be described as small. If this were sound the question would in each case be a matter of arithmetical calculation, and opinions would necessarily vary as to what constituted the "bulk of the proceeds" or "a small part" of the same in each particular case. The learned Judges seem to have lost sight of the true question which

falls to be answered in such cases, viz., whether the sale itself was one which was justified by legal necessity. This is the point of view from which the matter is approached in the earliest case cited at the Bar of *Hunoomanpersaud Panday v. Munraj Koonweree* (4). The case related to a charge upon property by way of mortgage, and not of a sale, but the principles to be applied appear to their Lordships to be the same as in the case of a sale of property. The headnote states correctly the points actually decided so far as bearing on the present case:

The power of a manager for an infant heir to charge ancestral estate by loan or mortgage is by the Hindoo law a limited and qualified power, which can only be exercised rightly by the manager in a case of need, or for the benefit of the estate....The actual pressure on the estate, the danger to be averted, or the benefit to be conferred in the particular instance, are the criteria to be regarded....

A lender, however, in such circumstances, is bound to inquire into the necessities of the loan and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. If he does inquire, and acts honestly, the real existence of an alleged and reasonably credited necessity is not a condition precedent to the validity of his charge, which renders him bound to see to the application of the money.

In delivering the judgment of the Board Lord Justice Knight Bruce, after stating the law substantially as laid down in the headnote, said:

The purposes for which a loan is wanted are often future as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a bona fide creditor should suffer when he has acted honestly and with due caution, but is himself deceived. (p. 424).

This decision was followed in the case of a sale by a Hindu widow in the case of *Ram Gopal Ghose v. Bullodeh Bose* (5), where it was held by the High Court of Calcutta that

where there is no doubt as to the necessity for a sale by a Hindu widow and the vendee pays a fair price for the property sold, and acts throughout bona fide, the mere fact of only two-thirds of the purchase money having been paid to creditors would not invalidate his conveyance, he not being bound to see to the application of his money.

A similar decision was pronounced by the same Court, *Bakoo Luchmeedhar*

(3) [1874] 1 I. A. 321=14 B. L. R. 187=22 W. R. 56=3 Sar. 380 (P. C.).

(4) [1856] 6 M. I. A. 393=18 W. R. 81=2 Suther 29=1 Sar. 552 (P. C.).

(5) [1864] W. R. 385.

Singh v. Ekbal Ali (6), where it was laid down that :

the rule that only so much of the property should be sold as will meet the necessity does not apply to cases where the excess is small, or where the money really required cannot otherwise be raised.

The case was a strong illustration of the principle laid down by Lord Justice Knight Bruce, because there was an admitted surplus of about Rs. 14,000 as to the mode of application of which there was no very distinct evidence, the total sale price having been Rs. 65,000. Nevertheless, the learned Judge, who delivered the opinion of the High Court, made this observation :

Looking at the transaction as a whole we consider it to be one in which it is proved that the purchaser acted with reasonable and sufficient care and caution and in which a sufficient necessity did exist. We, therefore, declare the sale to be good and valid against the plaintiff.

This case was followed by another in the same Court, *Lala Chatranarayan v. Uba Kunwari* (7), where a sale of a portion of an estate by a widow for Rs. 995 to pay off a debt of her father-in-law of Rs. 670 was not invalidated by the mere fact that she sold it for more than the amount of the debt when the purpose for which the sale was made, namely, the payment of the ancestral debt, was quite legal.

Similarly in *Kamikhaprasad Roy v. Sri-mati Jagadamba Dasi* (8), Mr. Justice Markby expressed the opinion thus paraphrased in the head-note, that :

In purchasing from a Hindu widow the purchaser is not bound to look to the appropriation of the money, nor is he affected by the fact that the alienation was made for a larger sum than the necessity of the case required.

Reference may also be made to the case of *Felaram Roy v. Bagolanaud Banerjee* (9), in which the Calcutta High Court held that :

Where a Hindu widow bona fide executed a permanent lease upon taking a selami of Rs. 125 in order to pay off a debt of her husband amounting to Rs. 100, this was not a case in which the reversioners should be allowed to recover possession upon payment of the amount actually needed to pay off the loan.

In the course of their judgment the learned Judges made this observation :

It would manifestly be impossible, and possibly prejudicial to the interest of the estate if the widow were to be held to be bound in every instance to sell property for payment of a debt due

from her husband for exactly the sum due to the creditor.

More important than any of these is the decision of this Board in an appeal from Madras, *Thirumalaiappa Mudaliar v. Nainar Tevan* (10). In that case the widow of a separated Mitakshara Hindu sold property belonging to her husband's estate in her possession as limited owner for Rs. 5,300 in order to pay off Rs. 4,588 due on two mortgages executed by her husband. The balance of Rs. 712 was appropriated by the widow to a purpose which did not constitute a legal necessity, but it was held that the sale was not invalid on this account, as the purchasers were not bound to see how the widow applied the purchase money.

All these decisions are, in their Lordships' opinion, entirely inconsistent with the judgment appealed from, and with the Allahabad cases on which it was based. They are equally inconsistent with the decision in a recent case from the same province, *Dwarka Ram v. Jhulai Pande* (11), and especially with the ground of judgment therein enunciated in the following absolute terms :

If any part of the consideration was invalid and not binding on the plaintiff, the plaintiff would be entitled to have the sale set aside, but if a portion of the consideration was good and binding on the plaintiff he would be entitled to reimburse it to the defendant. The form of the decree in a case of this kind should, therefore, be a decree for possession in favour of the plaintiff subject to his paying to the purchaser so much of the consideration as was required for the necessities of the family.

In a still more recent case from the same Province, *Daulat v. Sankatha Prasad* (12) the Judges of the High Court appear to have reverted to the principles upon which the judgment now under review is based, holding that :

the criterion for deciding whether the sale should be upheld or set aside is whether the portion which was not taken for legal necessity was such a small portion of the whole consideration that it might reasonably be left out of account.

As the sum in question was only Rs. 105 out of a total consideration of Rs. 2,142-12-6, the Court upheld the sale transaction, but directed the defendants to repay to the plaintiff the sum of Rs. 105 which was found not to be covered by legal necessity. It is to be remarked that this is the only case of those cited to their Lordships in which an

(6) [1867] 8 W. R. 75.

(7) [1868] 1 B. L. R. 201.

(8) [1870] 5 B. L. R. 509.

(9) [1909] 14 C. W. N. 895=6 I. C. 207.

(10) A. I. R. 1922 P. C. 307.

(11) A. I. R. 1923 All. 248=45 All. 429.

(12) A. I. R. 1925 All. 324=47 All. 355.

order for repayment of a small sum was made although the sale itself was sustained, and is entirely opposed to the whole current of authority. It was not done in the recent case decided by this Board, *Masid-Ullah v. Lala Damodar Prasad* (13). There a sum of Rs. 2,000 out of a total consideration of Rs. 18,400, was not shown to have been applied in the discharge of ancestral debts; but, on the other hand, there was no evidence that it was used for immoral or unauthorized purposes. In setting aside the judgment of the High Court and dismissing the plaintiffs' suit their Lordships made no condition as to the repayment of this balance of Rs. 2,000. It would rather appear that in any case where the sale has been held to be justified, but there is no evidence as to the application of a portion of the consideration, a presumption arises that it has been expended for proper purposes and for the benefit of the family. This is in line with the series of decisions already referred to, in which it was held that, where the purchaser acts in good faith and after due enquiry, and is able to show that the sale itself was justified by legal necessity he is under no obligation to enquire into the application of any surplus and is, therefore, not bound to make repayment of such surplus to the members of the family challenging the sale.

Applying the principles laid down in the above series of cases by this Board, and consistently followed in other Courts in India, except in Allahabad, their Lordships have reached the conclusion that the judgment of the High Court cannot be sustained. On the facts found by the District Judge it must be taken that the sale challenged was made after due enquiry as to the legal necessity by the vendee; that such necessity has been proved by him to the extent of Rs. 3,000 out of a total price of Rs. 3,500; that the sale was for an adequate consideration, and that the mere fact that, after a long interval of time, the appellants have not been able to establish how the surplus of Rs. 500 was applied is not a sufficient ground in law for setting aside the sale. They will, therefore, humbly advise His Majesty that the judgment and decree of the High Court should be set aside, and the plaintiffs' suit dismissed

with costs in all the Courts, including the costs of the present appeal.

Appeal allowed.

Solicitors for Appellants—*Hy. S. L. Polak.*

Solicitors for Respondents—*Douglas, Grant and Dold.*

* A. I. R. 1927 Privy Council 41

(On appeal from A. I. R. 1925 Cal. 401.)

29th October 1926

LORD PHILLIMORE, LORD SINHA,
MR. AMEER ALI AND LORD
SALVESEN

Lalit Mohan Pal Roy—Appellant.

v.

Srimati Dayamoyi Roy Chowdhurani (since deceased)—Respondent.

* *Hindu Law*—*Limited owner*—*Decree against, binds her and not the estate unless specific intention appears to that effect.*

Where a creditor files a suit against a limited owner (e. g. daughter) as such and not against the estate of the last male holder and a decree is passed personally against the limited owner, the decree and the auction sale of property following thereon does not bind the reversioner, although the foundation of the decree be a liability which might bind the reversion: *A. I. R. 1925 Cal. 401, affirmed.*

L. DeGruyther and W. Wallach—for Appellant.

S. C. Chaudhuri—for Respondent.

Facts fully appear in *A. I. R. 1925 Calcutta 401.*

Lord Phillimore.—Their Lordships are of opinion that the judgment of the High Court is right for the reasons given by that Court and especially for the reasons at line 25 on page 4 of the second part of the record where their Lordships say:

It is possible that although no charge was created, the original debt having been for lawful purposes, the creditor might have recovered his debt from the estate left by Bharat, if he had chosen to do so. But in order to make the estate liable he ought to have framed his suit in a proper manner. What he asked for was simply to have a personal decree against Monomohini and the guardian who was made the second defendant. The Court passed a decree against the minor alone. It does not appear anywhere that the minor was made a party to the suit as representing her father's estate.

Their Lordships will only add to this that they have been very much struck by the different framing of the two suits, the suit against the father's estate in

which the original debt was created, and the suit against Monomohini and her guardian.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for Appellant—W. W. Box & Co.

Solicitors for Respondent—S. L. Wilson & Co.

*** * A. I. R. 1927 Privy Council 42**

(From Madras : A. I. R. 1923

Mad. 282 F. B.)

13th December 1926

LORDS SINHA, BLANESBURGH AND
SALVESEN AND SIR JOHN WALLIS

T. V. Kalyanasundaram Pillai—Appellant.

v.

Karuppa Mooppanar and others—Respondents.

Privy Council Appeal No. 141 of 1924.

** * Transfer of Property Act, S. 123—Gift deed duly executed and attested but not registered—Gift accepted by donee—Donor cannot revoke.*

Where the donor of immovable property has handed over to the donee an instrument of gift duly executed and attested, and the gift has been accepted by the donee, the donor has no power to revoke the gift prior to the registration of the instrument: *A. I. R. 1925 Bom. 210 (F. B.)* and *40 Mad. 204, Appr.*

[P. 44, C. 1]

L. DeGruyther and B. Dube—for Appellant.

G. R. Lowndes and R. V. L. Narasimham—for Respondent.

Lord Salvesen.—These are two consolidated appeals from a judgment and two decrees dated 13th November 1922, of the High Court of Judicature at Madras. It is unnecessary to re-state the prior procedure or judgments which dealt with a number of contentions in law, and questions of fact now either finally disposed of or no longer insisted upon. It is sufficient to say that when leave to appeal was granted by the order of the High Court of 19th April 1923, it was on the specific ground that it raised the substantial question of law, namely,

whether an adoption of a son by a Hindu made after the execution and delivery of a deed of gift, but before registration thereof, renders a deed void as against the adopted son.

This is the only ground of appeal which is set forth in the appellant's case, and the respondents in their case, paragraph 2, take up the same position. Although, therefore, other grounds were indicated in the argument addressed to the Board which might have been equally fatal to the appeal, their Lordships think it right, in all the circumstances, to deal only with that which was the ground of judgment of the High Court, and in respect of which leave to appeal was given.

The relevant facts, which are no longer disputed, lie within short compass. On the 9th September 1891, a certain Vaithilingam Pillai executed a trust deed by which he appointed trustees to administer a trust for charity in the wide sense, including the maintenance of religious services at certain temples. In order to provide the necessary funds for the maintenance of these services, and for discharging the other duties imposed upon the trustees, he set apart certain immovable properties belonging to him, the income of which was to be devoted to the purposes of the trust. At the date of the deed, Vaithilingam had no son. The deed, however, was executed on the footing that it was his immediate intention to adopt a son for the perpetuation of his lineage, as although he had two wives, one of whom was living with him at the time, he was still childless and despaired of having issue. There is no question now that this constituted a gift of immovable property within the meaning of S. 123 of the Transfer of Property Act, 1882, nor is there any question that the trust deed, on the day of its execution, was duly delivered to the trustees named therein.

On 10th September 1891, Vaithilingam, by a deed executed on that day, adopted the appellant, then five years old, as his son. On 11th September, he executed a deed of guardianship to the newly adopted son, and on the 12th, a partition deed between himself and the guardian of that son, the effect of which need not, for the purpose of this judgment, be further referred to. On 15th September, three days later, the deed of gift was registered. On this it was contended for the appel-

lant that the deed of gift was not complete until registration, and that, as the grantor had before registration adopted the appellant as his son, the latter's rights in the family property had intervened so as to revoke or invalidate the gift. The leading statutory provisions on which the solution of the question depends are Ss. 122 and 123 of the Transfer of Property Act 1882, and Ss. 47 and 49 of the Indian Registration Act 3 of 1877. S. 122 of the Transfer of Property Act is as follows :

Gift is the transfer of certain existing moveable or immovable property made voluntarily and without consideration by one person called the donor to another called the donee and accepted by or on behalf of the donee. Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance the gift is void.

Section 123 is in these terms :

For the purpose of making a gift of immovable property the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

The controversy in the numerous cases in the Courts of India which have dealt with this point has always centred round the words in this section :

The transfer must be effected by a registered instrument,

and it has been forcibly argued that, until registration, there is no complete gift, and that if the donor dies or revokes or becomes incapable of making the gift before registration, it cannot take effect. On the other hand attention must be directed to S. 47 of the Indian Registration Act of 1877, which is in these terms :

A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration.

The learned Chief Justice in the Court below, after referring to the above sections, said :

The effect of those sections in my judgment is that if a title is complete except for registration, no subsequent alienation or dealing with the property by the vendor or donor as the case may be can defeat the title which on registration becomes an absolute title dating from the date of the execution of the document.

The other two Judges concurred in this view, making special reference to the case of *Venkati Rama Reddi v. Pillati Rama Reddi* (1), which, being a decision

of the Full Bench, was binding upon them. In that case the donor died on the day following the execution of the deed of gift, and the deed was not presented for registration until a period of six months had elapsed from the date of his death ; facts which, as it appears to their Lordships, were certainly not less cogent in favour of incompleteness than are those in the present case ; and there the District Judge held that the gift deed, not having been registered by the donor during her lifetime, was void, and that the post-mortem registration was of no effect. This judgment was, however, reversed on appeal by the unanimous decision of the Full Bench. There was no express finding of fact, so far as appears from the report, that the deed of gift had been delivered to and accepted by the donee prior to the death of the donor, although, perhaps, this may be implied from the circumstances. In the present cases fortunately, there is no room for doubt on this point, because the learned Judges of the High Court remitted this question of fact to the Subordinate Judge and he reported that the deed had been delivered over, on the day of its execution, to one of the trustees appointed under it on behalf of himself and the other trustee. The decision of the Full Bench in 40 *Madras* is thus summarized in the head-note :

There is nothing in S. 123 of the Transfer of Property Act which requires the donor to have the deed registered. All that is required is that he should have executed the deed. Once such an instrument is duly executed the Registration Act allows it to be registered even though the donor may not agree to its registration, and upon registration the gift takes effect from the date of execution.

Their Lordships think that this statement of the law needs qualification by reference to S. 122 of the Transfer of Property Act, and is only correct upon the footing that the gift had been accepted by or on behalf of the donee during the lifetime of the donor. A deed of gift executed in accordance with the terms of S. 123 of immovable property but never communicated to the intended donee, and remaining in the possession of the grantor undelivered, would, in their Lordships' opinion, not come within the ruling of the Full Bench in the case in question.

The only other case to which it is necessary to refer is a Full Bench deci-

(1) [1917] 40 Mad. 204=31 M. L. J. 690=4 L. W. 465=38 I. C. 707=(1917) M. W. N. 112.

sion of the High Court of Bombay in 1924, namely *Atmaram Sakharam Kalkye v. Vaman Janardhan Kashelikar* (2). The circumstances in that case were very much the same as in the present, and the decision is thus correctly expressed in the head-note:

Where the donor of immovable property has handed over to the donee an instrument of gift duly executed and attested, and the gift has been accepted by the donee, the donor has no power to revoke the gift prior to the registration of the instrument.

This case was very fully argued and the argument on behalf of the appellant in the present appeal could not be better stated than it was in the dissenting judgments of Shah, Acting, C. J. and Mulla, J.; and those arguments were all brought very forcibly under their Lordships' notice, and supplemented by the learned counsel for the appellant. Their Lordships, however, cannot accept them. They are unable to see how the provision of S. 123 of the Transfer of Property Act can be reconciled with S. 47 of the Registration Act, except upon the view that, while registration is a necessary solemnity in order to the enforcement of a gift of immovable property, it does not suspend the gift until registration actually takes place. When the instrument of gift has been handed by the donor to the donee and accepted by him, the former has done everything in his power to complete the donation and to make it effective. Registration does not depend upon his consent, but is the act of an officer appointed by law for the purpose, who, if the deed is executed by or on behalf of the donor and is attested by at least two witnesses, must register it if it is presented by a person having the necessary interest within the prescribed period. Neither death, nor the express revocation by the donor, is a ground for refusing registration, if the other conditions are complied with. Their Lordships accordingly find themselves in complete agreement with the judgment of the Full Bench of the Bombay High Court in the case cited. As this decision, and the similar decision of the Full Bench of the Madras Court, had settled the law for these Presidencies, it is unnecessary to refer to the various conflicting decisions of inferior tribunals which were overruled. Their Lordships apprehend that

the Judges of the High Court of Madras, in allowing leave to the appellant in the present case to proceed with his appeal, desired to elicit an authoritative opinion as to the soundness of the two latest decisions in the Madras Courts, and their Lordships think it desirable that a point which has occasioned so much controversy in the past should be settled by a decision, which will apply to the whole of India.

Their Lordships will accordingly humbly advise His Majesty that the judgment and decrees of the High Court should be affirmed, and that this appeal should be dismissed. The appellant must pay the costs.

Appeal dismissed.

Solicitor for Appellant—*H.S.L. Polak*
Solicitors for Respondents—*Douglas Grant and Dold.*

* * A. I. R. 1927 Privy Council 144

(From Rangoon *A. I. R.* 1926 Rang. 53)
(SEE ALSO *A. I. R.* 1925 RANG 296)

14th December 1926

LORDS PHILLIMORE, SINHA,
BLANESBURGH AND SALVESEN AND SIR
JOHN WALLIS

V. M. Abdul Rahman—Appellant.

v.

King-Emperor—Opposite Party.

Privy Council Appeal No. 58 of 1926.

* (a) *Practice (Criminal)*—*Privy Council*—*Appeal to, is restricted to very special grounds.*

The Board only recommends His Majesty to exercise his jurisdiction in appeals in criminal cases upon certain very restricted grounds.

[P. 45, C. 2]

* (b) *Criminal trial*—*Serious defect in conducting trial cannot be cured by consent of accused's advocate.*

No serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of the advocate of the accused.

[P. 47, C. 1]

* * (c) *Criminal P. C., S. 360*—*Object of reading over is to obtain accurate record from the witness and not to enable accused to suggest corrections.*

The object of reading over the deposition is to obtain an accurate record from the witness of what he really means to say, and to give him an opportunity of correcting the words which the Magistrate or his clerk has taken down. It is not to enable the accused or his advocate to suggest corrections.

[P. 47, C. 2]

(2) *A. I. R.* 1925 Bom. 210=49 Bom. 388 (F. B.).

* * (d) *Criminal P. C., S. 360*—*Accused not knowing Court's or witness' language—Deposition after it is read over to witness need not be interpreted to the accused.*

Where the accused does not understand either the language of the Court or of the witness, there is no provision for the deposition of a witness being interpreted to the accused after it has been read over and interpreted to the witness.

[P. 47, C. 2]

* (e) *Criminal P. C., S. 360*—*Provision as to reading over should be complied with except where it will be absurd.*

It is dangerous in cases of criminal law to accept equivalents, and except in cases where reading over to the witness would be absurd, as, for example, with a stone deaf person, the provision should be complied with: 33 Cal. 955, *Appr.*

[P. 48, C. 1, 2]

* (f) *Criminal P. C., S. 537*—*"Unless such error" qualifies all letters.*

The passage beginning "unless such error" does not qualify (d) only, but also the other letters of the alphabet.

[P. 48, C. 2]

* * (g) *Criminal P. C., Ss. 535 and 537*—*Mere non-compliance with S. 360 is not enough to quash conviction—Criminal P. C., S. 360.*

A mere omission or irregularity to comply with S. 360 unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction.

[P. 49, C. 2]

John Simon and Walter Frampton—for Appellant.

A. M. Dunne and Kenworthy Brown—for the Crown.

Lord Phillimore.—This appeal which is presented by special leave, arises in the following circumstances: One Mani Iyer, presented an insolvency petition in the High Court of Rangoon against the firm of D. K. Cassim & Sons, alleging that the firm had allowed the attachment of certain immovable properties to remain undischarged for over three weeks and had thereby committed an act of insolvency.

On hearing of the petition it appeared that the orders for the attachment had been made on the 19th and 21st November 1923, but that the date of execution was the 27th, and that within three weeks of the 27th, though not within three weeks of the 19th, the attachment had been discharged, and, therefore, there was no act of insolvency.

It appeared, however, that in order to support the petition, the dates of execution of the warrants had been altered from the 27th to the 20th and 21st, respectively.

This being so, the Judge dismissed the petition and reported the case with a view to criminal proceedings, and pro-

ceedings were taken against Mani Iyer and against the present appellant Abdul Rahman, who was alleged to have abetted the forgery in order to injure or ruin trade rivals.

After some mistaken steps, the matter finally came before the District Magistrate at Rangoon. He, after taking evidence, formulated two charges against each of the accused. The first was to the effect that each of them acting jointly with the other, instigated some person unknown to forge false dates and serial numbers on the warrants; and the second was that they attempted to procure the head process server to alter the dates on the register so as to make them correspond with the forged dates on the warrant.

Upon these two charges the District Magistrate convicted both the accused: and upon the first charge he passed sentence on each of two years rigorous imprisonment. In respect of the second charge he passed no sentence.

Both the accused appealed from these convictions and sentences to the High Court which affirmed the convictions, but reduced the sentences to rigorous imprisonment for nine months. From this conviction and sentence Abdul Rahman has now obtained special leave to appeal to His Majesty in Council.

One objection which is taken on behalf of the appellant can be disposed of shortly. It takes the form of an attack upon the conviction on the second charge, it being urged by counsel that though no sentence was passed in respect of this conviction, the Judges may have taken it into account in estimating the quantum of sentence to be passed on the first conviction.

Inasmuch as the sentence passed in respect of the first conviction was one which the conviction by itself would warrant, their Lordships desire themselves to be understood as not expressing any opinion as to the propriety of such a point being taken on an appeal to this Board. It is now well established that this Board only recommends His Majesty to exercise his jurisdiction in appeals in criminal cases upon certain very restricted grounds. But with this reservation their Lordships will deal with the point as it has been raised, and they are of opinion that it is not a good one.

It arises upon Sections 190 and 191 of the Code of Criminal Procedure, which provide as follows:

"190.—(1) Except as hereinafter provided, any Presidency Magistrate, District Magistrate or Sub-divisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognizance of any offence:

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a report in writing of such facts made by any police officer;

(c) upon information received from any person other than a police-officer, or upon his own knowledge or suspicion, that such offence has been committed.

191. When a Magistrate takes cognizance of an offence under sub-section (1), Clause (c), of the preceding section, the accused shall, before any evidence is taken, be informed that he is entitled to have the case tried by another Court, and if the accused, or any of the accused, if there be more than one, objects to being tried by such Magistrate, the case shall, instead of being tried by such Magistrate, be committed to the Court of Session or transferred to another Magistrate.

The complaint is that the Magistrate did not inform the accused that he was entitled to have the case tried by another Court, and for this purpose reliance is placed upon the case of *Emperor v. Chedi* (1), where a Magistrate, when trying the owners of certain licensed premises on a charge of refusing to admit the police, acquitted the employers and forthwith proceeded to try and convict the servant without giving him an opportunity of electing to be tried by another Magistrate.

But in that case the Magistrate was proceeding under Clause C, whereas in this case he was proceeding under Clause A. It was not a case in which while trying one person, the Magistrate finds occasion to formulate a charge against someone else, but a case in which he was taking cognizance of an offence after receiving a complaint of the facts which constituted the offence. He formulated this second charge as he formulated the first in consequence of the one complaint.

In this connexion *Begu v. Emperor* (2) is not without importance.

The second point and the one mainly relied upon on behalf of the accused can be best stated in his favour by setting out the material parts of an affidavit sworn on his behalf by his clerk Narayan which was produced to the Court of appeal. He deposes that he was present on all the dates on which witnesses

were examined before the District Magistrate, Rangoon,

that the procedure adopted by the Magistrate in the said trial in relation to the reading over of the depositions to the witnesses, who did not know English, was to hand over the depositions to the Interpreter, who read over and interpreted the same to the witnesses, and that while such reading over and interpretation was going on, the learned District Magistrate went on recording the depositions of other witnesses;

that in the case of English-speaking witnesses who gave their depositions in English, their depositions were handed over to them to read and the said witnesses read the depositions to themselves silently;

that in the case of some witnesses, who were examined in Burmese and could read English, namely, Po Shin, Head Clerk, Ba Kyaw, the Copyist, and Shwe Htun, the Process-server, the depositions were handed to them and they read their depositions to themselves silently;

that in none of those instances, where the witnesses read over their depositions to themselves silently, the depositions as recorded were read over and explained to the accused;

that even in the case of Burmese depositions, the statement of witnesses were in no time read over and explained to the accused, and

that his master does not know Burmese.

The procedure is regulated by the following sections of the Code of Criminal Procedure.

Section 360.—(1) As the evidence of each witness taken under S. 356 or S. 357 is completed it shall be read over to him in the presence of the accused if in attendance, or of his pleader if he appears by pleader, and shall, if necessary, be corrected.

(2) If the witness denies the correctness of any part of the evidence when the same is read over to him the Magistrate or Sessions Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness and shall add such remarks as he thinks necessary.

(3) If the evidence is taken down in a language different from that in which it has been given, and the witness does not understand the language in which it has been taken down, the evidence so taken down shall be interpreted in the language in which it was given or in a language which he understands.

Section 361.—(1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open Court in a language understood by him.

(2) If he appears by pleader, and the evidence is given in a language other than the language of the Court and not understood by the pleader, it shall be interpreted to such pleader in that language.

The point having been raised by the affidavit and the additional grounds of appeal on behalf of the accused, the High Court required a report from the District Magistrate, and it appeared that the course taken was adopted in order to save

(1) [1905] 28 All. 212=(1905) A. W. N. 285=2 A. L. J. 745.

(2) A. I. R. 1925 P. C. 130=6 Lah. 226.

time and to meet the wishes of the counsel for the accused.

Their Lordships have thought it right that this should be stated in exoneration of the District Magistrate, and because in applying S. 537 of the existing Code of Criminal Procedure, the Court is directed to have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings, but they wish it to be understood that no serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of the advocate of the accused.

Now with regard to the objections taken in this affidavit, they are two: the first being that the depositions were read over while other stages of the case were proceeding, so that the accused and his advocate could not attend to the reading over, being occupied with listening to the further evidence that was being given, and indeed, that they were not so loudly read that the accused or his advocate could hear them, and the second objection being that in some cases the depositions were not read out to the witnesses at all, they being left to read them to themselves.

What is more remarkable about this affidavit than its averments are its omissions. •

It does not aver, and as has been shown it could not aver, that any objection was taken by the accused or his advocate to the course pursued. It does not aver that the accused suffered any prejudice or that there was any correction of the evidence which any witness would have made, or which the accused or his advocate might with propriety have suggested, if all the depositions had been read out loud to the witnesses and to the accused and, where necessary, translated.

It does not suggest that there was any actual or possible failure of justice by reason of the course pursued, and this being the case, it would be contrary to the rule according to which this Board proceeds, if their Lordships were to entertain this appeal.

It has, indeed, been submitted by counsel that inasmuch as special leave to appeal has been granted, the ordinary rules limiting the exercise of this jurisdiction ceased to apply. But this is not so.

The case of *Arnold v. King-Emperor* (3) was a case where special leave had been given and where, notwithstanding such leave, their Lordships adopted and repeated the language of Lord Watson in *Dillet's case* (4) which was as follows

The rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shown that by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done.

These considerations really dispose of the appeal. Inasmuch, however, as questions have been raised as to the propriety of the course pursued at the trial, the duty of Indian Courts of appeal in criminal matters and the effect of Ss. 535 and 537 of the Code Criminal Procedure upon which there has been some difference of opinion in India, their Lordships think it desirable for the guidance of the Courts that they should pronounce their opinion upon these points.

With regard to one objection made on behalf of the accused, a careful study of the sections will show that the object of reading over the deposition is to obtain an accurate record from the witness of what he really means to say, and to give him an opportunity of correcting the words which the Magistrate or his clerk has taken down. It is not to enable the accused or his advocate to suggest corrections.

The distinction between S. 360 and S. 361 is very marked. Under the latter section, if evidence is given in a language not understood by the accused or his pleader, it is to be interpreted into their language, while under the former section, when it is read over, it is to be interpreted to the witness in his own language; but there is no provision for its being interpreted to the accused. Thus, if the depositions are taken down in English, and the language of the accused is Hindi, and the language of a witness is Burmese (as in the present case) the depositions will have to be taken by getting the witness' answers in Burmese, having them interpreted to the Court, so that they may be taken down in English, and further interpreted to the accused, so that he may understand them, in Hindi. When

(3) [1914] 41 Cal. 1023=23 I. C. 661=41 I. A. 149 (P. C.).

(4) 12 A. C. 459=56 L. T. 615=36 W. R. 81=16 Cox. C. O. 241.

however, the deposition comes to be read over, as it will be in English, it will be interpreted to the witness in Burmese, but not to the accused in Hindi; and if the accused knew neither English nor Burmese, he will be none the wiser.

No doubt the evidence has to be read over in the presence of the accused or of his pleader. He is entitled to be sure that it has been read over, and that the witness has had an opportunity of correcting the written word. But he is not necessarily entitled to the opportunity of suggesting corrections. Their Lordships are of opinion that upon the strict construction of the sections of the Code there was no violation of their provisions in the course taken with respect to those witnesses whose depositions were read over to them as already described.

At the same time, their Lordships cannot but see that it would be a better course if depositions other than mere formal ones were read over so that the accused or his pleader could hear them and give their undivided attention to them. Care would, of course, have to be taken that no suggestion should be conveyed to a witness in the form of a correction which would make him alter his evidence, but there might be obvious slips to which, under proper safeguard, attention might be called by the accused or his pleader. Still it should be remembered that the primary object is to fix the witness and to enable him to protect himself against any inaccuracy in the words taken down from his lips.

The second objection is more serious. S. 360 says that the deposition is to be read over to the witness. This provision is not complied with in terms by giving the witness an opportunity of reading it over to himself. He may do so in a slovenly and imperfect manner. He may not easily decipher the handwriting. He may not feel the responsibility in the same way that he would if it were read over to him. No doubt there are cases in which it would be more likely that accuracy would be obtained if the witness read over the deposition to himself, as for instance, if the pronunciation of the Magistrate or of the interpreter, in a language not his own, was difficult to follow, or if a witness was partially deaf. But it is dangerous in cases of criminal law to accept equivalents, and except in cases where reading over to the witness

would be absurd, as for example, with a stone deaf person the provision should be complied with. The course adopted in this case seems to be that which was condemned in the case of *Jyotish Chandra Mukerjee v. Emperor* (5).

Then arises the further question whether non-compliance in this respect should vitiate a trial, and in this connexion their Lordships have to consider the provisions of Ss. 535 and 537 of the Code of Criminal Procedure, which are as follows:—

535.—(1) No finding or sentence pronounced or passed shall be deemed invalid merely on the ground that no charge was framed, unless, in the opinion of the Court of appeal or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal or revision thinks that a failure of justice has been occasioned by an omission to frame a charge, it shall order that a charge be framed, and that the trial be recommenced from the point immediately after the framing of the charge.

537. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter 27 or on appeal or revision on account

(a) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial, or in any inquiry or other proceedings under this Code; or

(c) of the omission to revise any list of jurors or assessors in accordance with S. 324; or

(d) of any misdirection in any charge to a jury unless such error, omission, irregularity, or misdirection has, in fact, occasioned a failure of justice.

Explanation:—In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

The passage beginning “unless such error” does not qualify (d) only but also the other letters of the alphabet.

The legislation on this matter is of long standing. Their Lordships have referred to Ss. 426 and 439 of the Code of 1861; Ss. 283 and 297 of the Code of 1872 and 535 and 537 in the Codes of 1882 and 1898.

The variations are not important, the chief thing to note being that a rather trivial illustration which appeared in the Code of 1908 has disappeared from the present Code.

There have been a number of decisions in India upon these enabling or curing sections, but the only important one

(5) [1909] 36 Cal. 955=4 I. C. 416=14 C. W. N. 82.

which came before this Board is the case of *Subramania Iyer v. Emperor* (5a). There the trial of a man on charges of extortion in which 41 criminal acts extending over a period of two years were brought against him in contravention of a section of the Code which provides that a man can only be tried for three offences, and those committed within a period of 12 months, was held bad, and the conviction was quashed because the provisions of Section 537 of the then Criminal Procedure Code did not cure it.

The distinction between that case and the present is fairly obvious. The procedure adopted was one which the Code positively prohibited, and it was possible that it might have worked actual injustice to the accused.

The other authorities which have been brought to their Lordships' notice, are decisions of the High Courts in India. There is *Chedi's* case (1) already quoted, on which their Lordships offer no comment, and several decisions in Calcutta. One of the earliest is the case of *Sheikh Bazu* in 1867 where it was held by a Full Bench of the High Court of Calcutta that there had been an error in the action of the Magistrate in sending up joint charges against persons who took part in the riot on opposite sides, but that inasmuch as the accused had had a fair trial notwithstanding, the conviction should not be set aside.

A more apposite case is that of *Jyotish Chandra Mukerjee v. Emperor* (5) decided in 1909 already cited. The error in that case seems to have been the same as the error in the present case; but Jenkins, C. J., delivering the judgment of the Court, said that they were able to hold that in the special circumstances, the omission was not fatal.

On behalf of the appellant reliance was placed upon two later decisions of the High Court of Calcutta, both in the year 1924, and both reported in Volume 52 of the *I. L. R.* (Calcutta).

In the first case, that of *Hira Lal Ghose v. Emperor* (6), with regard to five depositions, it did not appear positively that they had been read over to the witnesses and the matter was left as one of inference; two others had not signed their depositions, and the Court held that

these irregularities could not be cured. It will be observed that the irregularity or omission in that case was graver than the irregularity in the case now under appeal, because in the present case all the witnesses signed their depositions as having either had them read over, or having read them over themselves. But even so their Lordships cannot accept the reasoning in that case, and they are of opinion that though it is regrettable that such an irregularity should creep in, and though it might be taken into account with other elements (if such there were) of objection to the satisfactory character of a trial it would not by itself be ground sufficient for quashing a conviction.

If, indeed, it were shown that the omission did lead or even with probability might have led to some material error in the depositions not being checked, the case would be otherwise.

The second case before the same Judges [that of *Durgahi v. Emperor* (7)] follows on the same lines, and the only further comment to be made upon it is that it was somewhat doubtful whether any error in fact had been committed, and that the learned Judges would rather seem to have neglected to use all the means which they might have used to enquire into the correctness of the facts alleged in objection to the conviction.

To sum up, in the view which their Lordships take of the several sections of the Code of Criminal Procedure, the bare fact of such an omission or irregularity as occurred in the case under appeal, unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction, which in their Lordships' view, may be supported by the curative provisions of Ss. 535 and 537. Their Lordships will humbly advise His Majesty that this appeal should be dismissed.

Appeal dismissed.

(5a) [1902] 25 Ind. 61=28 I. A. 257=11 M. L. J. 233=8 Sar. 160 (P. C.).

(6) 52 Cal. 159=A. I. R. 1924 Cal. 889.

(7) 52 Cal. 499=A. I. R. 1925 Cal. 831.

A. I. R. 1927 Privy Council 50

(From Patna)

29th November 1926

LORDS PHILLIMORE, SINHA,
BLANESBURGH AND SALVESEN*Radha Kishun and others*—Appellants.
v.*Hira Lal Sah and others*—Respondents.
Privy Council Appeal No. 116 of 1924;
Patna Appeal No. 31 of 1923.(a) *Contract Act, S. 60*—Debtor alleging appropriation in a particular way—Onus is on debtor.

Where the debtor alleges appropriation to be made in a particular way, burden is on him to prove the same. [P. 51, C. 2]

(b) *Interest—Compound—Burden—Proof.*

The burden is on the creditor of proving an agreement to pay compound interest. [P. 51, C. 2]

George Lowndes and S. Hyam—for Appellants.*A. M. Dunne and B. Dube*—for Respondents.**Lord Phillimore.**—The plaintiffs and defendants are respectively firms of Indian bankers who are close neighbours. They had business relations for a considerable period, the business beginning on the 5th Chait in the Fasli year 1309 and the relations ending on the 27th Katik in the Fasli year 1324.

The account is sometimes described as a natural current account, but as far as their Lordships have been permitted to see the papers, it was a one-sided account of loans made from time to time by the plaintiffs' firm and payments from time to time in whole or partial discharge of the advances. But the question of mutuality is not a material one.

Plaintiffs sued for the balance of the account with compound interest at the rate of 8 annas per cent. per monsem. The defendants claimed to reduce the rate of interest by one pie and disputed the claim of compound interest, and further pleaded that all the earlier items were barred by the Indian Limitation Act. The way in which they put their case as to limitation was this: they said that in the Fasli year 1321 they were in money difficulties, and that the plaintiffs refused to make them further advances; that there was an interval of about 16 months, and then a new arrangement was come to by which the plaintiffs

agreed to make advances provided that the sums advanced never exceeded Rs. 5,000 and provided that each advance was repaid before another was made; and the defendants claimed to appropriate their payments made, since the new arrangement began, to the new advances.

The plaintiffs, on the other hand, contended that there was no such specific appropriation, and that they might, as the creditors, appropriate the payments made by the debtors to the earlier items, which would otherwise be statute-barred. They denied that there was any change in the mode of transacting business from the start to the finish or any new arrangement made as suggested in the Fasli year 1323.

The accounts were sent to a Commissioner, whose report, except in respect of one item, was not questioned, and the matter then came before the Subordinate Judge for trial. The principal plaintiff and his gumasta gave evidence on the one side, and the principal defendant and his gumasta gave evidence on the other. Some other witnesses were examined, but their evidence is unimportant; and, except the accounts, there were no documents to consider.

Laying aside one disputed item, the books of both parties were in substantial agreement. They showed a number of entries at various intervals: loans and payments in discharge very frequently made, with a gap of approximately 16 months, and then during the later period advances of round sums never exceeding Rs. 5,000, always, except in one case which could be explained, paid off (but not necessarily in one payment) before another advance was made, and paid off so speedily that simple interest on all the advances during this period came to a smaller sum than Rs. 100. Defendants' evidence was, as already stated, that in the Fasli year 1321 they had got into financial straits, and the plaintiffs' firm refused to make them further advances, but that towards the end of 1323 their position had improved, and they then induced the plaintiffs to agree to finance them to the extent of Rs. 5,000, on the terms that each advance was specifically repaid before another was made.

The plaintiffs' case was that they never knew that the defendants were in financial straits, that they never refused credit, that it did just so happen for no

particular reason that they knew that the defendants had not come for advances during the 16 months, but that they never made any stipulation as to Rs. 5,000.

The Subordinate Judge came to the conclusion that the defendants' story was the true one. He came to this conclusion not so much because he thought the defendants' oral evidence more trustworthy, but because he thought that the circumstances of the various payments clearly implied that they were to be appropriated, and were in fact appropriated, each distinct debt being satisfied as shortly as possible after the date of the loan, and before a subsequent debt was incurred. No doubt the fact that the particularity with which these repayments were made is not only remarkable in itself, but in strong contrast with the accounts in the previous years. In his view, it was unnecessary to decide whether there was a previous agreement. He thought that the circumstances indicated that each time the defendants made a payment, they appropriated it to discharge a particular advance. Accordingly, he made a decree for Rs. 52-12-8, being simple interest on the several advances in the later period.

From this view, the High Court differed. The learned Judges thought that there had indeed been a fresh agreement made in the Fasli year 1323; but it was an agreement according to which the defendants were to be allowed a further credit of Rs. 5,000 in addition to their old debt, whatever it was. They laid stress on the fact that only on six of the twenty-three occasions was the sum advanced repaid in one repayment. But they seem not to have noticed, or, if they noticed, they failed to appreciate, the fact that in all the remaining 17 cases but one, the whole previous advance was repaid before a fresh advance was sought for. It is to be noted that there are expressions in the judgment of Das, J., which would lead their Lordships to suppose that if he had appreciated this fact, he might have come to a different conclusion.

Moreover, it is to be observed that to support his decision, Das, J., assumes in favour of the plaintiffs that an agreement was made to which the principal plaintiff never deposed and which is indeed inconsistent with his story.

The burden is upon the defendants to prove the appropriation for which they seek. Indeed, in their Lordships' opinion, it is a heavy burden and one which must be completely discharged. If all allowance for this is made, still the inference to be drawn from the accounts may be such as to justify the Subordinate Judge in accepting the defendants' evidence, while the reasoning by which the High Court supports a different conclusion is not satisfactory.

Still, however, their Lordships would be in doubt if it were not for another consideration. Strangely enough, both sides say that they were quite unaware how much was due in respect of the old debt incurred before the interval. This is probably because the interest columns had not been worked out in the books of either side.

Now there were two disputes about interest; one of slight importance, though it bulks rather largely in the judgment of the Subordinate Judge, whether the rate was 8 annas or 7 annas 9 pies as the defendants said.

Plaintiffs agreed to this extent, that they were ready to allow one pie as a deduction when the compound interest for which they contended was reckoned up.

The Subordinate Judge took the view that the rate must be 7 annas 9 pies, and the objection to his finding has not been pressed.

Compound interest is another matter. The burden is on the plaintiffs of proving an agreement to pay compound interest. They say that it is arrived at by taking yearly rests. The defendants say that it is only chargeable if and when an account has been stated; and in the present case no account was stated till the plaintiffs brought their suit.

Here again the Subordinate Judge was in favour of the defendants, and the High Court was in favour of the plaintiffs.

Now, as already observed, no entries or calculation as to interest were made in the books of either side, and no balance was struck at the end of any year. In itself, with so moderate a rate of interest, compound interest would not be unnatural or unusual; but it is difficult to see how it could be intended to be charged if no balance were struck and no intimation given; and there is a passage in the evidence of the plaintiff's

52 Privy Council DEO NARAIN PANDE v. AGYAN RAM PANDE (Lord Sinha) 1927

gumasta that certainly looks as if he took the same view as the defendants take as to the general practice; though in this case he deposed to there being a special agreement to pay compound interest.

Their Lordships do not think that this special agreement is made out, and in their view the Subordinate Judge was right upon this point and his decision should not have been reversed.

There remains the one disputed item. This, as found by the Commissioner, is a principal sum of Rs. 6,910. The Subordinate Judge found in favour of the defendants on this item, but the Judges of the High Court thought that his decision was uncertain, and as they were remitting the case back to him, desired him to reconsider this point. It does not appear that, as things stood, the High Court would have taken upon itself to reverse his finding.

If the question of appropriation is decided against the plaintiffs, neither the point of compound interest nor the point of this item becomes material. But in determining the question of appropriation it is not without importance to consider how the balance stood before the 16 months' interval.

If it is not a large figure, it is more likely to have been left out of consideration when dealings were renewed between the parties; and as their Lordships read the Commissioner's findings, if both these matters were decided against the plaintiffs, their share would only be Rs. 1,761, with some simple interest due to the plaintiffs before the 16 months' interval. Moreover, as already stated, neither side apparently cared what it was. These facts assist their Lordships in coming to the conclusion that the Subordinate Judge was right in his finding on the question of appropriation. His decision should not have been reversed, and their Lordships will humbly recommend His Majesty that the appeal should be allowed, and that the decision of the Subordinate Judge should be restored with costs here and below.

Appeal allowed.

Solicitors for Appellants — *Barrow, Rogers and Nevill.*

Solicitors for Respondents—*H. S. L. Polak.*

A. I. R. 1927 Privy Council 52

(From Allahabad)

10th December 1926

LORDS SINHA, BLANESEURGH AND
SALVESEN AND SIR JOHN WALLIS

Deo Narain Pande—Appellant.

v.

Agyan Ram Pande and others—Respondents.

Privy Council Appeals Nos. 10 to 12 of 1922; Allahabad Appeals Nos. 1 to 3 of 1919.

Hindu Law—Joint family — Separation — Onus—Evidence Act, S. 102.

Where jointness up to a certain date is proved, the onus of proving a separation subsequent to that date is on the party alleging such separation. [P. 54, C. 2]

L. DeGruyther and A. Majid — for Appellant.

Respondents—Ex parte.

Lord Sinha.—The principal question in these appeals is whether or not Deo-narain Pande and Thakur Persad Pande were at the time of the latter's death, members of a joint Mitakshara family.

The family pedigree, about which there is no dispute, is shown below:—
(For pedigree, see page 53.)

Thakur Persad died on the 3rd February 1911, leaving two widows, Ram Piari and Lal Dei, but no children. Thereupon, there was what has been called the inevitable preliminary contest for mutation of names in the revenue Courts. Deo Narain claimed that his name should be registered in lieu of Thakur Persad's in respect of all properties which stood registered in his name, jointly or otherwise, on the ground that Thakur Persad's interest had passed to him by right of survivorship. The widows claimed that they had succeeded to that interest, as Thakur Persad was separate from Deo Narain when he died. Agyan Ram did not forward any claim of his own in these mutation proceedings.

The revenue Courts decided in favour of the widows and against Deo Narain. Thereafter, on the 13th January 1914, Deo Narain instituted two suits in the Court of the Subordinate Judge of Basti, Nos. 13 and 14 of 1914.

Suit No. 13 of 1914 was brought against Agyan Ram and the two widows of Thakur Persad in respect of an elephant which was claimed as belonging

to the joint estate of Thakur Persad, deceased, and the plaintiff Deonarain.

Suit No. 14 of 1914 was brought against the widows, Mt. Ram Piari and Lal Dei for the recovery of the properties in dispute as forming the said joint estate.

Agyan Ram also brought a suit against the widows and Deonarain (No. 97 of 1914) claiming that he and not Deonarain was joint with Thakur Persad when the latter died.

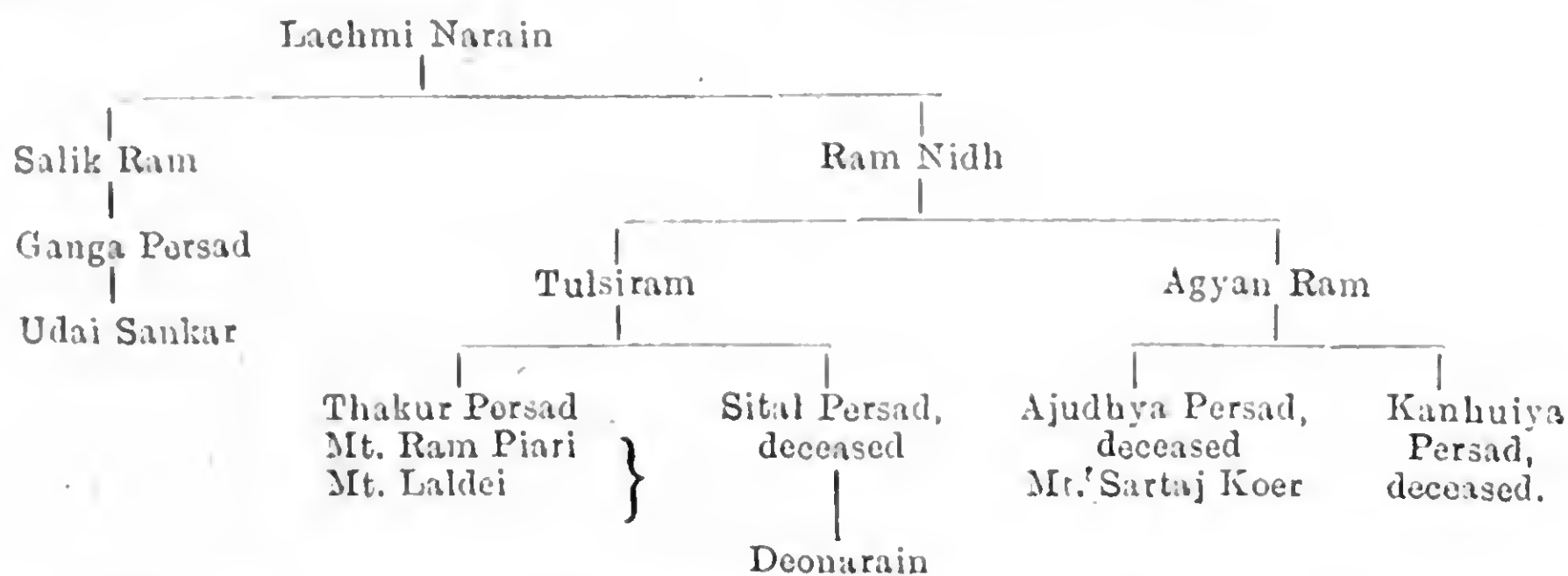
All the three suits aforesaid (No. 13, No. 14 and No. 97 of 1914) were tried together, and the two principal issues raised were:

1. Whether Thakur Persad, when he died, was joint with Deo Narain or Agyan Ram or neither?

2. Did Agyan Ram take possession of any elephant belonging to Thakur Persad and Deonarain (jointly). If so, what was its value?

died, and accordingly decreed the widows appeal and dismissed Agyan Ram's appeal in Suit No. 14. They decreed Agyan Ram's appeal in the elephant case on the ground that as Deonarain had no present interest in Thakur Persad's estate, he had none in the elephant, even if it did belong to that estate and not, as Agyan Ram claimed, to his daughter-in-law's estate of Luggupur.

Deonarain has appealed to His Majesty in Council against both the High Court decrees against him, viz., the one in favour of the widows, and the other in favour of Agyan Ram. The respondents in these appeals which have been heard together have not appeared and they have consequently been heard *ex parte*. Their Lordships have considered the whole of the evidence, which has been fully and fairly placed before them by the appellant's counsel.



After recording evidence, both oral and documentary, on behalf of all three parties, the Subordinate Judge, in an exhaustive and careful judgment, held that when Thakur Persad died, he was joint with Deo Narain but separate from Agyan Ram. He also held that Agyan Ram had taken an elephant, belonging to the joint estate of Thakur Persad and Deonarain and of the value of Rs. 2,000. He accordingly made a decree in favour of Deonarain in each of his suits (Nos. 13 and 14) and dismissed Agyan Ram's suit (No. 97).

The widows and Agyan Ram filed separate appeals to the High Court against the two former decrees and Agyan Ram also appealed against the decree in Suit No. 97.

The High Court heard all these appeals together and held that neither Deonarain nor Agyan Ram was joint with Thakur Persad when the latter

As is not uncommon in cases of this class in India, the bulk of the very considerable body of oral evidence in these cases on behalf of all the three parties was considered unsatisfactory and unreliable by both the Subordinate Judge and the High Court, and their Lordships agree in that opinion. Unfortunately, a good deal of the documentary evidence also is more or less inconclusive. Both Courts therefore found considerable difficulty in coming to a conclusion upon the evidence on what appears at first sight to be a simple question of fact.

In these circumstances, their Lordships would first consider what are the facts which were undisputed or have been concurrently found by both the Courts, and they appear to be as follows:

At one time, the two branches of the family of Lachminarain Pande were joint, with their ancestral home at village Datua Khor, where they had two houses,

one large and one small. They owned a number of villages, including one called Gumanari, in which they had a sort of hut called a khalunga (collection or cut-cheri-house). Some time prior to March 1889, there was a separation between the two branches, i. e., between Salikram's branch, represented by Ganga Persad, and Ram Nidh's branch, represented by Tulsiram and Agyan Ram. It is not clear whether there was at the same time a separation in fact between Tulsi Ram and Agyan Ram inter se. It is argued that when Ganga Persad separated, the whole coparcenary was dissolved as a matter of law, and Tulsi Ram and Agyan Ram became necessarily separated, though Tulsiram from that time would continue joint with his own son and grandson (Thakur Persad and Deonarain) who from then onwards constituted a new joint family. The case reported in *Hari Bakhsh v. Babu Lal* (1), is relied upon as authority for this proposition.

However that may be, it has been concurrently found by both the Courts that some time between 1889 and 1892 Agyan Ram did actually separate from his brother Tulsi Ram and his branch. Thereafter he never had any transaction jointly with Thakur Persad or his branch, and was separately recorded in the revenue register and the village papers, with regard to the villages jointly owned. Their Lordships have no hesitation in accepting this concurrent finding that Agyan Ram became separate from his brother Tulsi Ram's family before 1892.

The next undisputed fact in the history of the family is that about the year 1889 Tulsi Ram and his branch of the family left the ancestral home at Datua Khor and migrated to Gumanari where they converted the little khalunga into their family residence. Agyan Ram continued to live with his family in the old home at Datua Khor. Tulsiram died shortly after 1889 and thereafter Thakur Persad and his minor nephew Deonarain continued to live at Gumanari, until Thakur Persad built a new house at village Mohna Khor, some time between 1901 and 1904, to which he removed with his two wives, leaving Deonarain to live in the Gumanari house with his family. Both Courts have found and their Lordships agree that neither Deonarain nor

Agyan Ram ever lived in this house at Mohna Khor.

The reason why Thakur Persad removed to Mohna Khor has been variously stated in the evidence. It is not necessary to go into that matter, as it is not the case of any of the parties to this litigation, and there is no evidence even to suggest that a partition took place between Thakur Persad and Deonarain at the time when the former removed his residence from Gumanari to Mohna Khor.

Deonarain was a child when Tulsi Ram's family removed to Gumanari about 1889 and after Tulsiram's death he remained joint with his uncle Thakur Persad; and the sworn testimony of Thakur Persad himself, in Suit No. 781 of 1896, recorded on the 13th of January 1897, proves incontestably that on that date he and Deonarain were still joint. The onus of proving a separation between them subsequent to that date is of course on the party alleging such separation.

The case made on behalf of Thakur Persad's widows—and in this respect Agyan Ram supported them—was that such separation took place in fact some time towards the end of 1897 or early in 1898, shortly after Deonarain attained his majority. Considerable oral evidence was adduced to prove that at this time Deonarain was pressing for a partition which was effected and by which Deonarain gave up his share in the different villages over which the family estate was scattered and took in lieu thereof the whole of the 12 annas share or patti in village Gumanari which previously belonged jointly to himself, Thakur Persad and Agyan Ram.

The Subordinate Judge rejected the case so made. It was, he considered, invented after the mutation proceedings, as no such case was at that time made by the widows or by Agyan Ram who was then supporting them.

The High Court on the other hand accepted this case. Mr. Justice Walsh considered that though the evidence of express partition could not be accepted, Deonarain's own course of conduct, in residence, business and life and his insincere efforts to explain them away show conclusively that he had separated from Thakur Persad. Mr. Justice Piggott in a careful judgment reviewed the whole evidence and while agreeing with the Subordinate Judge that much

(1) A. I. R. 1921 P. C. 126=5 Lah. 92 (P. C.).

of it was unreliable also came to the conclusion that the circumstances of the case generally and the documentary evidence afforded a great deal of corroboration to those witnesses who deposed to a definite separation between Deo Narain and Thakur Persad shortly after the former had attained his majority.

Taking first the direct evidence, it appears that Mr. Justice Piggott was inclined to accept the evidence, in part at least, of two of the witnesses who deposed to an actual and formal separation in 1897 or 1898, viz., Shivraj Ram Sukul, the family priest, examined on behalf of Agyan Ram, and Tribeni Lal, the village Patwari (a witness for the widows). Apart from the discrepancies in their evidence to which the learned Judge himself alludes and the unfavourable comments thereon by the Subordinate Judge, it appears to their Lordships that this evidence cannot be accepted for the following substantial reasons. Firstly, because the partition they speak to as having taken place in 1897-98 is one between the three co-sharers, viz., Thakur Persad, Deonarain and Agyan Ram, and not merely between the two former. Having regard to the finding that Agyan Ram had separated before 1892, it is impossible to accept the story which assumes that he remained joint till 1898. But the matter does not rest there. If the story was true, Agyan Ram in 1898 gave up his share in village Gumanari to Deonarain. But the revenue registers show that Agyan Ram continued to be recorded as proprietor of a 3 annas 10 pies 8 chataks share not only in 1911, when Thakur Persad died, but even after the widows got their names registered. What is of even greater importance is that the Patwari's village papers (Ex. R. and Ex. 5), filed on behalf of the widows, show beyond doubt that Agyan Ram continued to realize the rents of his share of Gumanari, through his agent Chail Behari Lal in 1315 and 1316 Fasli (1908-09). Thus the whole basis of the alleged partition by which Deonarain took the share of Agyan Ram in Gumanari in addition to his own and Thakur Persad's fails entirely. There is the further fact referred to in the judgment of the Subordinate Judge that the alleged partition would have also affected the shares of

Thakur Persad and Agyan Ram as between themselves in the other villages in such a manner that thereafter Agyan Ram would collect two-thirds and Thakur Persad one-third of the rents thereof—a fact which is not only not borne out, but disproved by the evidence. Nor is it possible altogether to ignore the fact that no such partition was alleged by the widows in the mutation proceedings.

There remains for consideration the circumstantial evidence which was considered by the High Court to support the story of a partition in 1897-98. That resolves itself into (1) separation of residence; and (2) documents after 1898 showing that Thakur Persad and Deonarain were transacting business separately.

As regards residence, it is sufficient to observe that Thakur Persad admittedly did not remove to Mohna Khor till after 1901—possibly 1904. This change of residence is hardly any evidence to prove a partition in 1897-98.

As regards documents, showing transactions by members of the family, quite a number were proved to make out either joint or separate dealings. There are 17 such on the record executed between 1896 and 1911. Of these the most important are four conveyances or sale deeds—all of them in favour of Thakur Persad and Deonarain jointly. One of these four, Ex. 3, is a conveyance by which Thakur Persad and Deonarain purchased in their joint names a small share in village Datua Khor on the 21st of October 1903, i. e., more than ten years after the alleged partition. With regard to this document, it cannot be argued, as it can in support of some of the others, that the consideration was money owed to the family prior to 1898, for in this case the consideration was partly in cash and partly money owing under mortgages of as late as 1906 and 1907.

The rest of the documents, fully summarized by the Subordinate Judge are either insignificant or inconclusive in their nature; so far as they show joint dealings they discredit the alleged partition, and the mere fact that either of them had small transactions of their own does not prove that they were necessarily separate.

On the whole their Lordships are of opinion that the widows did not dis-

charge the onus which rested upon them of proving that there was a separation between Thakur Persad and Deonarain in 1897-98 or at any time prior to the death of the former in 1911.

There remains the question of the elephant in Suit No. 13 of 1924. The Subordinate Judge held that an elephant belonging to the joint estate was wrongfully taken possession of by Agyan Ram and that the latter's defence to the effect that it belonged to his daughter-in-law Sartaj Kueri, proprietress of the big Luggupur estate, was not made out. Agyan Ram appealed. As the High Court held that Deonarain was separate from Thakur Persad, and, therefore, took no present interest in his estate or in the elephant, even if it belonged thereto, they decreed the appeal. As their Lordships have arrived at a different conclusion on the main question, it is necessary to consider how far the Subordinate Judge's judgment and decree for Rs. 2,000 in favour of Deonarain is well founded.

Having considered the evidence placed before them, their Lordships see no reason to interfere with that decree.

Their Lordships will accordingly humbly advise His Majesty that the decrees of the High Court appealed from should be set aside with costs and the decrees of the Subordinate Judge restored and that the respondents pay the costs of these appeals.

G.B.

Appeal allowed.

Solicitors for Appellant—*Raymond, Oliver & Co.*

Respondents—*Ex-parte.*

* A. I. R. 1927 Privy Council 56

(From Bombay)

3rd February 1927

LORDS PHILLIMORE, CARSON AND
DARLING AND MR. AMEER ALI

*Lingangowda Dod-Basangowda Pati
and others—Appellants.*

v.

*Basangowda Bistangowda Patil and
others—Respondents.*

Privy Council Appeal No. 184 of
1924.

* *Civil P. C., S. 11, Expl. 6—Hindu family—Each member cannot be allowed to litigate the same point over again—Hindu law—Joint family.*

In the case of a Hindu family where all have rights, it is impossible to allow each member of the family to litigate the same point over and over again, and each infant to wait till he comes of age, and then bring an action, or bring an action by his guardian before; and in each of these cases, therefore, the Court looks to Explanation 6 of S. 11 of the Civil P. C., to see whether or not the leading member of the family has been acting either on behalf of minors in their interest, or if they are majors, with the assent of the majors: *A. I. R. 1925. P. C. 272, Ref. [P. 56, C. 2, P. 57, C. 1]*

K. Brown—for Appellants.

G. R. Lowndes and E. B. Raikes—for Respondents.

Lord Phillimore.—Their Lordships have listened carefully to the arguments of counsel for the appellants, but they are of opinion that on the first point, which, decided in the way in which they propose to decide it, determines the appeal, the judgment of the High Court was right. Their Lordships adopt their reasons. It was necessary for a decision in the previous suit that the Judge should consider what was the position in the family of the fourth and fifth defendants, now the present respondents, and he came to a very clear decision on the evidence, that not only were they members of the joint family, but that they were in possession of some of the joint family property. It seems, therefore, to be beyond doubt that the question has been decided in previous litigation between the parties. That is the material part of the decision of the High Court, except with regard to one point which was urged by counsel for the appellant, and to which their Lordships have given further consideration. The judgment says:

It has not now been urged as it was urged in the lower Court that the present plaintiffs, who are the sons of the plaintiff in that suit, are not bound by the decision.

Counsel for the appellants says truly that nobody is ever precluded from raising a point of law, except where there are some other considerations which would make it unfair that he should raise it. But when he seeks to argue it now, the answer is, that this was not a pure point of law. It depended very largely upon the facts. In the case of a Hindu family where all have rights, it is impossible to allow each

member of the family to litigate the same point over and over again, and each infant to wait till he becomes of age, and then bring an action, or bring an action by his guardian before; and in each of these cases, therefore, the Court looks to Explanation 6 of S. 11 of the Code of Civil Procedure to see whether or not the leading member of the family has been acting either on behalf of minors in their interest, or if they are majors, with the assent of the majors. In this case there is no question of majors. It seems clear that the plaintiff in the previous suit was acting on behalf of himself and his minor children to try to exclude a collateral branch from a share of the family property. If he had succeeded the judgment would have inured for the benefit of the children, and as he has failed, they must take the consequences. Their Lordships had occasion to comment upon and apply this Explanation 6, in the case of *Mata Prasad v. Nageshar Sahai* (1).

In their Lordships' view this appeal fails, and they will humbly advise His Majesty that it be dismissed with costs.

D.D. *Appeal dismissed.*

Solicitors for Appellants—*Douglas, Grant & Dold.*

Solicitors for Respondents—*T. L. Wilson & Co.*

(1) A. I. R. 1925 P. C. 272=47 All. 883=52 I. A. 398 (P. C.).

* * A. I. R. 1927 Privy Council 57

(From Bombay: A. I. R. 1922 Bom. 383)

18th January 1927

LORDS SINHA, BLANESBURGH, AND
SALVESEN AND SIR JOHN WALLIS

Shri Sachidanand Vidya Shankar Bharati Swami Guru Shri Sachidanand Vidya Narsinha Bharati Swami Jagadguru and another—Appellants.

v.

Shri Vidya Narsinha Bharati Guru Vidya Shankar Bharati Swami Math Karvir and another—Respondents.

Privy Council Appeal No. 33 of 1925.

* * Civil P. C., O. 23, R. 1—Compromise Decree—Transfer pending suit—Compromise bet-

ween transferee and opposite party is valid though transferrer is not joined although a party to suit.

Where a party to suit transfers his interest in the subject-matter to another and the transferee is brought on record and the transferrer's name continues on the record, compromise effected between the transferee and the opposite party relating to the subject-matter is valid though the transferrer is not a party to the compromise.

[P. 59, C. 2]

*G. R. Lowndes and J. M. Parikh—*for Appellants.

*L. De Gruyther and E. B. Raikes—*for Respondents.

Sir John Wallis.—This is an appeal from a decree of the High Court of Bombay setting aside the decree of the Subordinate Judge of Belgaum in terms of a compromise entered into between the plaintiff and the second defendant in the suit, and remanding the case for disposal, on the ground that the decree was passed in the absence of the first defendant and without notice to him.

The suit, O. S. 219 of 1910, instituted in the Subordinate Court of Belgaum, was between rival claimants to the office of Jagadguru or head of the Sankeshwar and Karvir Mutt, an ancient foundation having two branches, one at Sankeshwar in the Belgaum district of the Bombay Presidency and the other in the Native State of Kolhapur (which of the two is the principal branch is in dispute), and owning properties both in British territory and in Kolhapur. The dispute as to the succession arose from the fact that Balavadakar, a former head of the Mutt, who had appointed and installed one Brahmanalkar as his successor in 1903, afterwards, in 1906, purported to revoke the appointment, and to appoint one Athanikar, who, in turn appointed and installed the plaintiff in 1909. Brahmanalkar, on the other hand, denied that he had been lawfully deposed, and before his death in 1909 appointed and installed one Atmaram Shastri, who was the original defendant in this suit. The plaintiff alleged that lands owned by the Mutt in British India, which included the Mutt at Sankeshwar, were in the possession of the plaintiff, but that by order of the Commissioner of the Southern Division the inam villages and cash allowances (in British India) were being held in Amanat (under attachment) and were to be given to the claimant who should obtain a decree declaring his right. The plaintiff accordingly prayed for a declaration that

the plaintiff was the owner of the property moveable and immovable of the Sankeshwar and Karvir Mutt and of the powers and rights of that Mutt as the duly appointed Jagadguru.

The written statement alleged that the Court had no jurisdiction as the Sankeshwar Mutt was only a branch of the principal Mutt in Kolhapur and the Kolhapur Durbar alone had power to decide who was head of the Mutt; that that Durbar had decided that the defendant was the head of the Mutt, and that, in any case, Balavadakar had no power to depose Brahmanalkar (through whom the defendant claimed), or to appoint the plaintiff.

Atmaram Shastri died in November 1916, having appointed and installed Atmaram Pitri, the present first defendant, who was brought on the record as defendant on the 28th March 1917. Subsequently, on the 3rd June 1917, the first defendant appointed and installed the second defendant Kurtkoti. This having apparently come to the knowledge of the plaintiff on the 25th July 1917, he obtained leave to administer interrogatories to the first defendant. The questions and answers, which are material for the purposes of the present case, were as follows:

Question 1.

Have you installed your disciple on your "Gadi" (seat). And if (you) have installed (him) give particulars in details in respect of the name, &c., of that disciple Swami.

Answer 1.

We (I) installed our (my) disciple on our "Gadi" (seat), and he has been named "Shri Vidya Shankar Bharati Swami Jagadguru" in accordance with the usage followed in continuity.

Question 2.

Do you legally exist so far as this suit is concerned.

Answer 2.

No.

Question

3. In case your legal existence so far as this suit is concerned is lost, will you please explain as to whom you have transferred rights (and) interest, &c., in the property in this suit you have.

Answer 3.

As I have lost my legal existence I have transferred my right and interest,

&c., in the property in suit to the aforesaid Shri Vidya Shankar Bharati Swami Jagadguru.

The first defendant followed up these answers by applying on the 21st September 1917, that Kurtkoti's name might be entered as defendant. In his petition he stated again that all the rights of the Jagadguruship and

all the rights over the income of immovable and moveable property of the Samsthan belonging to me have been transferred to him.

He would appear to have wished that Kurtkoti should be substituted for himself as defendant, but the plaintiff, to whom notice went, petitioned that Kurtkoti be nowly entered among the defendants, and he was accordingly added as second defendant, leaving the first defendant on the record. The second defendant then filed an additional written statement in which he stated, among other things, that the plaintiff had appointed Shirolkar as his disciple. The plaintiff admitted that he had appointed Shirolkar as his disciple, to succeed him, but denied that he had resigned the office of Jagadguru in his favour. In these circumstances Shirolkar was added as third defendant in the suit.

It now becomes necessary to advert briefly to the circumstances which led up to the compromise. The second defendant, on his appointment by the first defendant, had entered into possession of the Mutt premises and villages in Kolhapur, but subsequently the Maharajah of Kolhapur ordered his officers to enter into possession of the Mutt villages for reasons which it is unnecessary to examine. Correspondence followed, and eventually, by way of protest, as it seems to their Lordships, the second defendant left the Kolhapur Mutt and premises, taking with him nothing but his sanyasi robe and beggar's staff and bowl. He then approached the plaintiff and a meeting was held between them and their pleaders, at which a compromise was arrived at; and a decree was subsequently passed in terms thereof. The first defendant was not a party to the compromise and the decree was passed in his absence and without notice to him, but one of the terms was that he should be paid any costs he had incurred, and this term was embodied in the decree. Shortly, the compromise was that the plaintiff's name

should be entered in the Government records as the owner of all the property in suit, that the second defendant should receive Rs. 8,001 a year out of the suit property and half the collections in the hands of Government under attachment; that the second defendant and his disciple, if he made one, should have no rights over the Sankeshwar Mutt and its estate; that the second defendant should have the right to found a new Mutt north of the Nerbudda river; and that, if the second defendant got back to the villages in Kolhapur he should during his lifetime pay the plaintiff and his successors one-half of the income.

The first defendant then presented a petition for a review of the compromise decree on the ground that the second defendant had obtained the decree by alleging that the first defendant had transferred all rights, title and interest in the suit properties to him, whereas only a limited interest was transferred to the second defendant not entitling him to alienate the Mutt properties, that the first defendant had always remained a party to the suit, and that his interest thus continuing to subsist, no compromise decree could be passed without notice to him. Lastly, the petition alleged that before the date of the compromise the second defendant had surrendered his right, title and interest in the Mutt to the first defendant and had ceased to have any authority with reference to the Mutt and its properties. The Subordinate Judge dismissed the petition for review observing that, not being a party to the decree, the first defendant could not be bound by it and could not be aggrieved by a decree which was not binding on him. The first defendant presented an appeal from the compromise decree. The appeal came before Shah and Hayward, JJ., who called for findings on the following issues:—

(1) Had Defendant No. 1 any subsisting interest as alleged by him in his application for review at the date of the compromise between plaintiff and Defendant Nos. 2 and 3 in the property in respect of which a declaration was sought in the suit?

(2) Having regard to the nature of the property with reference to which the declaration was sought by the plaintiff, was the compromise between the plaintiff and Defendant Nos. 2 and 3 lawful?

The case went back to a new Subordinate Judge, who recorded findings in

the negative on both issues. As regards the first issue he found that the first defendant had no subsisting interest and had none when he made his application for review even as regards the Kolhapur branch.

On these findings the appeal came on again before Macleod, C. J., and Shah, J., when the learned Chief Justice gave judgment allowing the appeal and setting aside the compromise decree on the ground that the first defendant remained on the record after the second defendant was added as a party. The suit, he observed, was of a very special nature and affected the position of all parties, not only from a religious point of view, but also from their position as owners of property. The plaintiff might have applied to strike off the first defendant's name, when it would have been decided whether he had any interest in the suit or not. As it was, the first defendant appeared to have such an interest in the disputes which were in issue in the suits as to entitle him to have the compromise set aside.

Their Lordships are unable to agree with this view. The first defendant was sued solely as the rival claimant to the office of Jagadguru, and after transferring the office to the second defendant, he stated, in answer to interrogatories administered by the plaintiff, that he no longer legally existed so far as the suit was concerned, as he had transferred all his rights to the second defendant, a declaration repeated in his petition to bring on the second defendant in his place. In these circumstances, the mere fact that he so remained on the record did not, in their Lordships' opinion, make the compromise to which he was not a party, or the compromise decree which was passed in his absence and without notice to him, binding upon him in any subsequent proceedings so as to give him a sufficient interest in the suit to entitle him to appeal. The one question in the suit was, who was entitled to the office of Jagadguru. The first defendant admittedly transferred all his rights in the office to the second defendant, in whom they were still vested at the date of the compromise decree, which established the plaintiff's right to the office and its properties in British India. In their Lordships' opinion the fact that the first defendant continued on the record did

not entitle him to intervene in the contest between the plaintiff and the second defendant, or to object to the admission by the second defendant of the plaintiff's claim to the office and its endowments either absolutely or on terms. If the rights of the public the institution or its dependants, including the first defendant, are injuriously affected by the compromise, relief may be sought by appropriate proceedings, but the first defendant has no right of appeal in this suit. This result is the less to be regretted if as found by the Subordinate Judge, the appeal is really being prosecuted by the Kolhapur Durbar in the name of the first defendant. In their Lordships' opinion the appeal should be allowed, the decree of the High Court set aside, and the decree of the Subordinate Court restored with costs here and below and they will humbly advise His Majesty accordingly.

D.D.

*Appeal allowed.*Solicitors for Appellants—*Downer & Johnson.*Solicitors for Respondents—*T. L. Wilson & Co.*

* A. I. R. 1927 Privy Council 60

(From Calcutta)

21st January 1927

LORDS PHILLIMORE, CARSON, AND
DARLING, MR. AMEER ALI AND SIR
LANCELOT SANDERSON

Sonaton Pal—Appellant.

v.

J. C. Galstaun and others—Respondents.

Privy Council Appeal No. 77 of 1925,
from Calcutta Appeal No. 10 of 1924.

* (a) *Practice—Privy Council—Printing records—Objection raised—Registrar of the High Court should decide.*

If one party thinks a document should be printed and the other party thinks it unnecessary, reference is made to the Registrar of the High Court who determines, at any rate, in the First instance, what should be done.

[P. 61, C. 2]

* (b) *Practice—Unnecessary documents—Solicitor should select the necessary documents.*

It does not follow that because unnecessary documents have been printed in India, they should be included in the books bound for their Lordships. It is the duty of the solicitor in England to make a selection of the necessary

documents. The other papers should be ready at hand in case they should be required. In cases of doubt the solicitor should take the advice of counsel on this point, for which purpose an application being made a fee will be allowed. [P. 61, C. 2, P. 62, C. 1]

K. V. L. Narasimham and P. V. Subbarow—for Appellant.

G. R. Lowndes and B. Dube—for Respondents.

Lord Phillimore.—Their Lordships do not require to hear counsel for the first respondent who alone appears.

This is an action brought by the first respondent, the plaintiff, to enforce against the estate of one Sookias, deceased, an equitable mortgage by deposit of deeds accompanied by a letter or memorandum explaining the deposit. The contesting defendant, who is the present appellant, was a judgment-creditor of the estate of the deceased, and interested, therefore, in disputing the validity of this mortgage, which, as the accounts have now been agreed, would, if valid, exhaust or nearly exhaust the whole property. His case was that there was no such equitable mortgage; that there was no such deposit of deeds on the date mentioned, if ever, and that, at any rate, it was not a deposit to secure a debt; if it was a deposit at all, it was for other purposes; but in substance he denied that there had ever been a deposit and he said that the alleged letter accompanying the deposit was a forgery. The deposit was alleged to have taken place in May 1914, probably on the 22nd, and the letter which followed was dated the 30th June. It is to this effect: "J. C. Galstaun, Esq.," then his address is given.

Dear Sir, I handed over the title-deeds of my Gopechur property to you on the 22nd May 1914, with a view to create a security for the debts that I owed you and for further advances and acceptances on my account. As evidence thereof I give you this letter, as desired by you.

And then there follows a list of the documents, and it purports to be signed by Sookias. The plaintiff and his manager both deposed to the fact of the deposit and to the correctness and genuineness of the signature by Sookias, and their evidence was supported by a brother of Sookias. Nobody was called to say that the signature was not the signature of Sookias, except one man who disputed the genuineness of a number of signatures by Sookias which were found by both Courts to be

genuine, and therefore his evidence was not of much importance. The Subordinate Judge, however, found that there had been no deposit and that the letter was a forgery, basing his judgment upon certain correspondence which had passed between the plaintiff and Sookias, chiefly letters written by Sookias which, in his view, did not look like there being an equitable mortgage; upon the fact that the handwriting was laboured in the way that an imitation would be laboured and that there were certain grammatical faults in the letter as produced; upon the motive which the plaintiff would have, having been extremely fond of the Sookias family, to preserve the property of the Sookias family for the family from their creditors; and upon various small grounds of suspicion.

In those circumstances, there being nobody, except the one discredited individual who would venture to say that the signature was not the signature of Sookias, the only motive to be alleged against the plaintiff was not his own greed of gain but his charity for people who may have belonged to his community and were distantly related to him, and then really for a comparatively small amount, because if there had been no such mortgage, the plaintiff's debt, which is admitted, would have swept out, in competition with the other creditors, the greater part of the estate. However, the learned Subordinate Judge upon those grounds took upon himself the very bold course of 'disbelieving this evidence, and finding perjury and forgery.

The High Court, in an extremely careful judgment, have reviewed that evidence and have come to the conclusion that there was no warrant at all for suspecting this gentleman or his manager of any such crimes.

With regard to the handwriting, so far as it is a matter for the Courts unaided by expert evidence to examine it, the High Court came to a different conclusion to that of the Subordinate Judge, and their Lordships here, having compared several of the signatures of Sookias, see no reason to disagree with the view taken by the High Court.

That being the case this appeal seems to have been an audacious appeal, and, in their Lordships' opinion, entirely fails,

and their Lordships will humbly advise His Majesty that it should be dismissed with costs.

But their Lordships have not concluded all that they have to say in the matter. A very large and cumbrous record has been produced and put before their Lordships, containing, amongst other things, a mass of accounts which were obviously immaterial after the High Court had said that the parties had agreed the accounts between them and had agreed what was due to the plaintiff as a creditor. The solicitor acting here for the appellant had notice in a letter sent to him by the Registrar, of the 3rd November 1926, that attention would be drawn to the record in this case

which contains a large quantity of matter which should not be included and which, as at present advised, should the appellant succeed, I shall not be prepared to allow on taxation.

Their Lordships asked Mr. Narasimham what he could say about this subject. He pointed out that in Calcutta it was very difficult, if one party contended that the documents should be printed and made part of the record in the case, for the other party to resist it. Their Lordships do not agree with this statement. They have the advantage of the assistance of Sir Lancelot Sanderson, who has just returned from India, and they understand that the practice, at any rate, in Bengal (and this case comes from Bengal), is well settled. If one party thinks a document should be printed, and the other party thinks it unnecessary, reference is made to the Registrar of the High Court, who determines, at any rate in the first instance, what should be done. Their Lordships have no reason to suppose that the respondent did desire that these accounts should be made part of the record, but if he did the appellant should not have rested content, but should have gone to the Registrar or the Court for directions in respect of that matter.

That is so far as the legal advisers in India are concerned. In their Lordships' opinion, if the appellant had succeeded, all these costs would have been disallowed for the reasons given.

But there is another matter on which their Lordships have called for the attendance of the solicitor for the appellant here. It does not follow that because unnecessary documents have been

printed in India, they should be included in the books, bound up for their Lordships. It is the duty of the solicitor in this country to make a selection of the necessary documents. The other papers should be ready at hand in case they should be required. In cases of doubt the solicitor should take the advice of counsel on this point, for which purpose, on application being made, a fee will be allowed.

Their Lordships have intimated the same opinion to other solicitors on other occasions. They have thought it necessary to require the attendance of the solicitor in order to make it quite clear to the profession that drastic action will be taken if more care is not used in this matter.

D.D. *Appeal dismissed.*

Solicitors for Appellant — Hy. S. L. Polak.

Solicitors for Respondents — Watkins & Hunter.

* A. I. R. 1927 Privy Council 62

(From Ontario)

18th January 1927

VISCOUNT HALDANE, VISCOUNT FINLAY,
LORDS WRENBURY, DARLING AND
WARRINGTON OF CLYFFE.

British America Nickel Corporation Limited, and others—Appellants.

v.

M. J. O'Brien Limited—Respondent.

Privy Council Appeal No. 52 of 1926.

* *Companies Act, (Indian Act of 1913), S. 20—(English Act of 1908), S. 13—Power to modify terms on which debentures are secured—Power must be exercised in the interest of a class as a whole.*

To give a power to modify the terms on which debentures in a company are secured is not uncommon in practice. The business interests of the company may render such a power expedient even in the interests of the class of debenture-holders as a whole. The provision is usually made in the form of a power, conferred by the instrument constituting the debenture security, upon the majority of the class of holders. It often enables them to modify, by resolution properly passed, the security itself. The provision of such a power to a majority bears some analogy to such a power as that conferred by S. 13 of the English Companies Act of 1908, which enables a majority of the shareholders by special resolution to alter the Articles of Association. There is, however, this restriction of such

powers, when conferred on a majority of a special class in order to enable that majority to bind a minority. They must be exercised subject to a general principle that the power given must be exercised for the purpose of benefiting the class, as a whole, and not merely individual members only. Subject to this, the power may be unrestricted. [P 62 C 2, P 63 C 1]

F. H. Moughan and Glyn Osler—for Appellants.

W. N. Tilley and G. M. Hewitt—for Respondents.

Viscount Haldane.—This is an appeal against a judgment of the Court of Appeal of Ontario, affirming the judgment of Kelly, J., by which it was found in favour of the minority of a class of secured debenture-holders of the appellant corporation that the minority were not bound by resolutions passed by the majority of the class of such debenture-holders. The latter had purported to exercise a power conferred on such a majority by the terms of a trust deed. The resolutions in question sought to modify the rights of the debenture-holders as an entire class.

Before their Lordships proceed to consider the somewhat involved circumstances in which the question arises, it will be convenient that they should refer to the principle to be applied in weighing the outcome of these circumstances.

To give a power to modify the terms on which debentures in a company are secured is not uncommon in practice. The business interests of the company may render such a power expedient, even in the interests of the class of debenture-holders as a whole. The provision is usually made in the form of a power, conferred by the instrument constituting the debenture security, upon the majority of the class of holders. It often enables them to modify, by resolution properly passed, the security itself. The provision of such a power to a majority bears some analogy to such a power as that conferred by S. 13 of the English Companies Act of 1908, which enables a majority of the shareholders by special resolution to alter the Articles of Association. There is, however, this restriction of such powers, when conferred on a majority of a special class in order to enable that majority to bind a minority. They must be exercised subject to a general principle, which is applicable to all authorities conferred on

majorities of classes enabling them to bind minorities. It is that the power given must be exercised for the purpose of benefiting the class as a whole, and not merely individual members only. Subject to this, the power may be unrestricted. It may be free from the general principle in question when the power arises not in connexion with a class, but only under a general title which confers the vote as a right of property attaching to a share. The distinction does not arise in this case, and it is not necessary to express an opinion as to its ground. What does arise is the question as to whether there is such a restriction on the right to vote of a creditor or member of an analogous class on whom is conferred a power to vote for the alteration of the title of a minority of the class to which he himself belongs.

It was decided by the Judicial Committee in 1887, in *North-West Transportation Company v. Beatty* (1) that where a contract, fair in its terms and within the powers of a company, had been entered into by the directors with one of their own number, as a vendor to them, and was therefore voidable, it could not be assailed. The reason was that it had been ratified by the shareholders at a general meeting. At this meeting the ratification was actually obtained by the aid of the votes of the vendor director himself and his nominees, which produced a majority of shareholders' votes at that general meeting. The vendor in exercising his votes had thus a direct personal interest. It was held that the affirmance of the voidable contract, being matter only of internal policy, was binding on the company, and further that every shareholder, including the vendor, had a right to vote on such a question, notwithstanding that he might have a personal interest in the subject-matter in conflict with the interest of the company itself. As its constitution enabled the vendor, individually to acquire shares freely, he was entitled to the votes thus carried and to qualify a majority at the meeting. Having regard to the constitution of the company this could not be said to be oppressive so as to invalidate the voting. There the question

arose, not as regarded a class of creditors, but of shareholders.

In *Burland v. Earle* (2) the question before the Judicial Committee was whether it was ultra vires for a company to carry its profits to reserve instead of dividing them, and to invest them in a manner which, although not ultra vires, was objectionable. It was also a question with shareholders only. A minority of shareholders sued the others, the company itself not being a plaintiff, to compel the company and its directors to distribute accumulated profits, and also to compel the appellant Burland to hand over certain funds invested in his sole name. It was held that the question, being in no way one of ultra vires action, was one of internal management only, and that any action that could be taken required that the company itself should be plaintiff. It would have been otherwise had the acts complained of been of an ultra vires or actually fraudulent character, as had been explained by James and Mollish, L. JJ., in *Menier v. Hooper's Telegraph Works* (3), where the majority of the shareholders had improperly appropriated to themselves property which belonged to all the shareholders equally. It was laid down in *Burland v. Earle* (2) that a shareholder is not debarred from using his voting power as a shareholder to carry a resolution by the circumstance of his having a particular interest in the subject-matter of the vote, following in this the decision in *The North-West Transportation Company v. Beatty* (1).

It has been suggested that the decision in these two cases on the last point is difficult to reconcile with the restriction already referred to, where the power is conferred, not on shareholders generally but on a special class, say, of debentureholders, where a majority in exercising a power to modify the rights of a minority, must exercise that power in the class as a whole. This is a principle which goes beyond that applied in *Menier v. Hooper's Telegraph Works* (3) inasmuch as it does not depend on misappropriation or fraud being proved. But their Lordships do not think that there

(1) [1887] 12 A. C. 589=50 L. J. P. C. 102=57 L. T. 426=36 W. R. 647.

(2) [1902] A. C. 83=71 L. J. P. C. 1=85 L. T. 553=50 W. R. 241=18 T. L. R. 41=9 Manson 17.

(3) [1878] 9 Ch. 350=43 L. J. Ch. 330=30 L. T. 209=22 W. R. 396.

is any real difficulty in combining the principle that while usually a holder of shares or debentures may vote as his interest directs, he is subject to the further principle that where his vote is conferred on him as a member of a class he must conform to the interest of the class itself when seeking to exercise the power conferred on his capacity of being a member. The second principle is a negative one, one which puts a restriction on the completeness of freedom under the first, without excluding such freedom wholly.

The distinction, which may prove a fine one, is well illustrated in the carefully worded judgment of Parker, J., in *Goodfellow v. Nelson Line* (4). It was there held that while the power conferred by a trust deed on a majority of debenture-holders to bind a minority must be exercised bona fide, and while the Court has power to prevent some sorts at least of unfairness or oppression, a debenture-holder may, subject to this, vote in accordance with his individual interests, though these may be peculiar to himself and not shared by the other members of the class. It was true that a secret bargain to secure his vote by special treatment might be treated as bribery, but where the scheme to be voted upon itself provides, as it did in that case, openly for special treatment of a debenture-holder with a special interest, he may vote, inasmuch as the other members of the class had themselves known from the first of the scheme. Their Lordships think that Parker, J., accurately applied in his judgment the law on this point.

Their Lordships now turn to the facts in the appeal before them. The appellant Nickel Corporation was constituted under the law of the Dominion of Canada. The Corporation was the owner of valuable mining properties in the Province of Ontario and of plant there and elsewhere. In 1913 the appellant Corporation had bought from M. J. O'Brien now represented by the respondent Company and from one John R. Booth mining properties, and had given them, as part of the purchase price, bonds secured on these properties amounting to approximately \$3,000,000. On a reorganiza-

tion, to be presently referred to, these bonds were exchanged for bonds secured under a trust deed. The Nickel Corporation had an authorized capital of \$20,000,000, divided into 200,000 ordinary shares of \$100 each. Before the reorganization the Corporation had issued debenture stock to the amount of \$10,000,000, secured by floating charges. The appellant Trust Company was the trustee of a deed which constituted the floating security, and is also trustee of the securities in question in this appeal.

By contract of 10th March 1916, the British Government had agreed to purchase the Nickel Corporation's output of nickel up to a large amount for a period of ten years. On 15th March 1916 the Nickel Corporation, being desirous of reorganizing its finances and of putting them on a more satisfactory footing, executed a mortgage deed of trust in favour of the second appellant as trustee to enable them to issue bonds. These bonds were issued at 6 per cent. interest in two series. A and B. of \$3,000,000 each, specially secured on assets of the Nickel Corporation, and ranking *pari passu*, with a difference only in the period for redemption. The bonds were held substantially as follows:

	\$
J. R. Booth, A Bonds ...	2,184,000
(Mr. Booth had held bonds in the older form, which were now paid off.)	
J. F. Booth, A Bonds ...	147,000
Frances D. Anderson, A Bonds	38,000
C. A. Masten, A Bonds ...	6,000
M. J. O'Brien, Ltd., A Bonds	625,000
	<hr/>
	\$3,000,000
The British Government, B Bonds ...	3,000,000
	<hr/>
	\$6,000,000

The British Government had, as already stated, bought the output of nickel by the appellant Corporation, and it appears to have been desirous to strengthen the position of the Corporation by aiding it to raise a loan.

The trust deed of 15th March 1916 provided power to a majority of the bond-holders, consisting of not less than three-fourths in value, to sanction a reconstruction of the Corporation, to enter into a scheme for selling its assets, to sanction any modification of the rights

(4) [1912] 2 Ch. 324=81 L. J. Ch. 564=107 L. T. 344=19, Manson 265=28 T. L. R. 461.

of the bond-holders against the Corporation or its property, either under the trust deed or otherwise, to accept other securities of the Corporation in lieu of the bonds, or to consent to an issue of securities constituting a prior charge together with other powers.

The effect of the war was to disorganize the markets of the appellant Corporation, so that it was mainly by the aid of purchases of its stock by a Norwegian nickel group, and by the co-operation of the British Government, that the appellant Corporation carried on its business between 1916 and 1919. The Norwegian group purchased both debenture stock and ordinary stock in large amounts. As the Corporation was indebted to its bankers in the end of 1920, at a meeting of the first mortgage bondholders authority was given for the creation of a prior lien bond for \$500,000 having priority over the first mortgage bonds, and this was issued to the bank.

In February 1921 the Nickel Corporation made default in payment of the half-year's interest due to the respondent on the first mortgage bonds. A scheme for reconstruction was prepared on behalf of the Corporation and was laid before a meeting of the first mortgage bondholders on 31st March 1921. The object of this scheme was to compel the holders of the first mortgage bonds to exchange them for an amount of new "A" income bonds equal to the principal of the former bonds. The Corporation was also to be at liberty to issue \$6,000,000 of first income bonds at 10 per cent. interest and at 20 per cent premium, to be a first charge on the property of the Corporation. Provision was made for the issue of the "A" income bonds already referred to to rank subsequently to the first income bonds. The bank and the Norwegian creditors were, by means of these issues, to have their claims reduced. The Corporation was also to be enabled to issue "B" income bonds to the amount of \$12,500,000, ranking *pari passu* as to principal with the "A" income bonds. There was also given power by extraordinary resolution to sanction the exchange of the "A" income bonds into other securities, and the British Government was to be

relieved of its obligation to purchase nickel.

It was further provided by the scheme that a committee of four persons (one appointed by the first mortgage bondholders other than the British Government; one by the Debenture Stockholders; one by the bank, the Canadian Bank of Commerce, and a certain Dr. Eyde, representing the Norwegian interests; and one by the British Government) should have power to modify the scheme without confirmation by extraordinary resolution of the bondholders.

Mr. John R. Booth's vote was necessary in order to gain the required majority of bondholders, and it was secured by a promise to give him \$2,000,000 of the ordinary stock of the Nickel Corporation. This stock was at the time of little value, but it was evident that if the price of nickel rose it might become of value. The promise to Mr. Booth was made some months before the new scheme was submitted to the bondholders.

The respondents protested against the adoption of the scheme, but it was carried by the prescribed majority at the meeting of 31st March 1921. The respondents then applied for an interim injunction, but the Court allowed the resolutions to be carried into effect, on the terms that if at the trial of the action it should be found that they ought not to have been carried into effect, the appellant Trust Company should pay to the respondents the amount of these bonds with interest.

At the trial in the Supreme Court of Ontario, Kelly, J., held that what was really done was that the majority at the meeting did not act in the bona fide exercise of the rights which the majority might exercise, but in consideration of what would benefit the Nickel Corporation and the personal interests of those whose votes were to be secured. The vote had been influenced by special negotiations in advance of the meeting. He also thought that it was outside the powers of the majority to confer on a Committee, not necessarily representing the interests of the first mortgage bondholders, powers which belonged to those bondholders alone, and to authorize the substitution for their security of something which was not a satisfactory

security. He therefore gave judgment for the respondents, the plaintiffs.

There was an appeal to the Court of appeal, where Ferguson, J. A., delivered the judgment. He agreed with Kelly, J., in holding that the votes neither of Mr. Booth nor of the British Government would have been given for the scheme had they been influenced only by what was most in the interest of the bondholders. Both of these may, he thought, have acted honestly if mistakenly. But what really moved them was not a legitimate consideration of the improvement of their security, but that they felt that a refusal to approve the scheme would result in serious loss to other persons who had lent to or invested in the Corporation. They wished to give those persons a chance, even if a risk to the bondholders had to be taken in doing it. This the Court of appeal held to have been improper. On that ground they affirmed the judgment of Kelly, J., and they affirmed it also on the ground that there was no power in the majority of the bondholders to delegate their powers of binding the minority.

Their Lordships are of opinion that judgment was rightly given for the respondents in this appeal. In the first place, it is plain, even from his own letters, that before Mr. J. R. Booth would agree to the scheme of 1921 his vote had to be secured by the promise of \$2,000,000 ordinary stock of the Nickel Corporation. No doubt he was entitled in giving his vote to consider his own interests. But as that vote had come to him as a member of a class he was bound to exercise it with the interests of the class itself kept in view as dominant. It may be that, as Ferguson, J. A., thought, he and those with whom he was negotiating considered the scheme the best way out of the difficulties with which the Corporation was beset. But they had something else to consider in the first place. Their duty was to look to the difficulties of the bondholders as a class, and not to give any one of those bondholders a special personal advantage, not forming part of the scheme to be voted for, in order to induce him to assent. On this ground by itself their Lordships are of opinion that the resolutions cannot stand. They think, in the second place, that the appointment

of a committee of four persons, with power to modify in a very extensive fashion the security of the mortgage bondholders, was ultra vires. As has been pointed out the appointment of the majority of this Committee was not entrusted to the mortgage bondholders themselves. They might have acted together by a proper majority, but neither in form nor in substance, was any power given to that majority to delegate. It was only under the provisions of the deed of mortgage and trust of 15th March 1916 that the scheme of 31st May 1921 could be made, and the former contained no provision authorizing it. Other points referred to in the judgments were raised in criticism of the scheme, but it is not necessary for their Lordships to enter on them.

For the reasons given they will humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for Appellants—*Blake & Redden.*

Solicitors for Respondents—*Lawrence Jones & Co.*

* A. I. R. 1927 Privy Council 66

(From Ontario)

7th February 1927

VISCOUNT FINLAY AND VISCOUNT
DUNEDIN, LORDS PARMOOR AND
DARLING WARRINGTON OF CLYFFE
William Robins—Appellant.

v.

National Trust Co., Ltd., and others—
Respondents.

Privy Council Appeal No. 122 of 1925.

* (a) *Will*—*Testamentary capacity*—*Existence as to, is a question of fact.*

Whether a man at the time of making his will had testamentary capacity, and whether a will was the result of his own wish and act, or was procured from him by means of fraud or circumvention or undue influence, are pure questions of fact. [P. 66, C. 1]

* (b) *Privy Council*—*Rule as to concurrent findings applies to all judicatures subordinate to Privy Council.*

The rule as to concurrent findings is not a rule based on any statutory provision. It is rather a rule of conduct which the Privy Council has laid down for itself. As such it has gradually developed. The judicature which has given greatest occasion for its development has

undoubtedly been the judicature of India, but the principle is not in any way limited in its application to Indian Legislature or Indian Law. The rule is a rule of conduct for the Empire, and will be applied to all the various judicatures whose final tribunal is the Privy Council.

[P. 68, C. 1]

(c) *Privy Council—Concurrent findings of two Courts—Second appeal Court will not ordinarily interfere.*

The Privy Council as Court of second appeal will not interfere with concurrent judgments of the Courts below on matters of fact unless very definite and explicit grounds for that interference are assigned such as miscarriage of justice or the violation of any principle of law or procedure: 28 Cal. 1 (P. C.) and 31 Cal. 871 (P. C.), *Ref.*

[P. 68, C. 1]

This expression means such departure from the rules which permeate all judicial procedure as to make that which happened not in the proper use of the word judicial procedure at all.

[P. 68, C. 2]

There is also another way of preventing the application of the rule. If it can be shown that the finding of one of the Courts is so based on an erroneous proposition of law that if that proposition be corrected the finding disappears, then in that case it is no finding at all.

[P. 68, C. 2]

The rule (as to concurrent findings) is none the less applicable because the two Courts may not have taken precisely the same view of the weight to be attached to each particular item of evidence: 33 Cal. 303 (P. C.), *Ref.*

[P. 70, C. 1]

* (d) *Will—Testamentary capacity—Proponent has to prove.*

According to English Law those who propound a will must show that the will of which probate is sought is the will of the testator, and that the testator was a person of testamentary capacity. In ordinary cases if there is no suggestion to the contrary, any man who is shown to have executed a will in ordinary form will be presumed to have testamentary capacity, but the moment the capacity is called in question then at once the onus lies on those propounding the will to affirm positively the testamentary capacity. Moreover, if a will is only proved in common and not in solemn form, the same rule applies even though the action is to attack a probate which has been granted long ago: *Barry v. Butlin*, 2 Moo. P. C. 480; *Cross v. Cross* 3 Sw. & Tr. 292; and *Tyrrell v. Panton* (1894), P. 151, *Ref.*

[P. 68, C. 2]

Stuart Bevan, O. E. Fleming and Robert Aeke—for Appellant.

Glyn Osler, J. J. Rode and I. F. Hellmett—for Respondents.

Viscount Dunedin.—The late Edward Chandler Walker was at first senior partner of the firm of Walker & Sons, and thereafter when that firm was changed into a limited company was President of Walker & Sons, Limited, whiskey distillers, Walkerville, Ontario. He was a very wealthy man, married, but with no children, and he died on the 11th March 1915, leaving a widow. He left

a will of date 27th February 1914, and the respondents are the trustees and the principal beneficiaries under the said will. The said will revoked all prior wills. The testator had made a prior will on 21st December 1901, under which the appellant is a beneficiary. The present action is at the instance of the appellant to set aside the will of 1914, and restore the will of 1901. The grounds on which he seeks to set aside the will of 1914 are:

Want of testamentary capacity in the testator on the date of the execution of the said will;

Fraud or undue influence by which the testator's brothers obtained the execution of the said will.

The appellant was manager of the company, both as a firm and afterwards as a limited company, for a long period, and was on terms of great intimacy with the testator. The appellant left Walkerville in 1914, and went to England. He alleges that he only came to know of the will of 1901 under which he was a beneficiary, and of the state of affairs as at the date of the will of 1914, in April 1922. On the 23rd June 1923, he raised the present action against the executors, and the beneficiaries were afterwards added as defendants.

The action was tried before Mowat, J., without a jury. Evidence was read on both sides. The evidence was voluminous and contradictory, and the trial lasted six or seven days. The learned Judge found that no testamentary incapacity of the testator had been made out, and that it had not been shown that the execution of the will was induced by fraud or undue influence, and he dismissed the action. Appeal was taken to the Appellate Division of the Supreme Court of Ontario, and that Court unanimously affirmed the judgment of the trial Judge. Appeal has now been taken to the King in Council, and the appellant has sought to induce their Lordships who sat on this Board to examine and revise the evidence and to come to the conclusion that the result arrived at by the trial Judge and the Court of appeal was wrong. This raises in a quite distinct way the question of whether their Lordships will examine the evidence in order to interfere with the concurrent findings of two Courts on a pure question of fact. Whether a man

at the time of making his will had testamentary capacity, whether a will was the result of his own wish and act or was procured from him by means of fraud or circumvention or undue influence, are pure questions of fact. The rule as to concurrent findings is not a rule based on any statutory provision. It is rather a rule of conduct which the Board has laid down for itself. As such it has gradually developed. The judicature which has given greatest occasion for its development has undoubtedly been the judicature of India, but the principle is not in any way limited in its application to Indian legislation or Indian law, be it Hindu or Moslem, as such. Indeed it is obvious that if such a rule is a good rule to be applied to the findings of the Courts in India, there could be no reason for suggesting that the findings of the Courts of our great self-governing Dominions should be entitled to less consideration. Their Lordships wish it to be clearly understood that the rule of conduct is a rule of conduct for the Empire, and will be applied to all the various judicatures whose final tribunal is this Board.

Being, as has been said, a rule of conduct, and not a statutory provision, the rule is not cast iron, but it would avail little to try to give a definition which should at once be exhaustive and accurate of the exceptions which may arise.

It will be sufficient to quote what has been said on this subject in the past.

In *Moung Tha Hnyeen v. Moung Pan Pyo* (1) Lord Hobhouse delivering the judgment of a Board which included Lord Macnaghten and Lord Lindley, said :

There has been nothing to show that there has been a miscarriage of justice or that any principles of law or of procedure have been violated in the Courts below. This case is one which very decidedly falls within the valuable principle recognised here commonly observed in second Courts of Appeal, that such a Court will not interfere with concurrent judgments of the Courts below on matters of fact; unless very definite and explicit grounds for that interference are assigned.

And in *Rani Srimati v. Khajindra Narayan Singh* (2), Lord Lindley repeated the view :

The appellants have failed to show any miscarriage of justice or the violation of any principle.

(1) [1900] 28 Cal. 1=27 I. A. 166=4 O. W. N. 808=2 Bom. L. R. 985=7 Sar. 786 (P. C.).

(2) [1904] 31 Cal. 871=31 I. A. 127=9 O. W. N. 74=8 Sar. 695 (P. C.).

ple of law or procedure. Their Lordships, therefore, see no reason for departing from the usual practice of this Board of declining to interfere with two concurrent findings on pure questions of fact.

There was a faint attempt made in the present case to argue that what the appellant considered a quite inadequate appreciation and an unjustifiable belittling of a certain witness whom he regarded as all important would amount to a miscarriage of justice. The expression means no such thing. It means such departure from the rules which permeate all judicial procedure as to make that which happened not in the proper use of the word judicial procedure at all. There is, however, also another way of preventing the application of the rule. If it can be shown that the finding of one of the Courts is so based on an erroneous proposition of law that if that proposition be corrected the finding disappears, then in that case it is no finding at all. Such an attempt was made with great skill and pertinacity by Mr. Bevan for the appellant in the present case. He laid stress on the law as it had been authoritatively settled in England, and in Ontario in such matters the law of England rules. Now the English Courts have gone what some might think pretty far on the question of what duty lies on those who propound a will. Those who propound a will must show that the will of which probate is sought is the will of the testator, and that the testator was a person of testamentary capacity. In ordinary cases if there is no suggestion to the contrary any man who is shown to have executed a will in ordinary form will be presumed to have testamentary capacity, but the moment the capacity is called in question then at once the onus lies on those propounding the will to affirm positively the testamentary capacity. Moreover, if a will is only proved in common and not in solemn form, the same rule applies even though the action is to attack a probate which has been granted long ago. These propositions will be found to be settled by the following cases :

Barry v. Butlin (3), *Cross v. Cross* (4), *Tyrrell v. Painton* (5).

(3) 2 Moo. P. C. 480.

(4) [1864] 3 Sw. & Tr. 292=33 L.J.P. 49=10 Jur. N. S. 183=10 L. T. 70=12 W. R. 694

(5) [1894] P. 151=6 R. 540=70 L. T. 453=42 W. R. 843.

Now their Lordships will assume that these cases are right. The reason for this form of expression is that the Appellate Division of the Court of Ontario in the case of *Larocque v. Landry* (6), seem to have taken another view, for that Court held that once probate was granted though only in common form, the onus was on him who sought to set it aside. Now when an Appellate Court in a Colony which is regulated by English law differs from an Appellate Court in England, it is not right to assume that the Colonial Court is wrong. It is otherwise if the authority in England is that of the House of Lords. That is the supreme tribunal to settle English law, and that being settled, the Colonial Court which is bound by English law is bound to follow it. Equally, of course, the point of difference may be settled so far as the Colonial Court is concerned by a judgment of this Board.

But in the present case their Lordships do not consider it necessary to settle which of the two views is right; they will assume for the purposes of this discussion, that the English rule is right. But given the law the appellant in their Lordships' opinion fails in its application to the facts. Their Lordships cannot help thinking that the appellant takes rather a wrong view of what is truly the function of the question of onus in such cases. Onus is always on a person who asserts a proposition or fact which is not self-evident. To assert that a man who is alive was born requires no proof. The onus is not on the person making the assertion because it is self-evident that he had been born. But to assert that he was born on a certain date if the date is material, requires proof; the onus is on the person making the assertion. Now, in conducting any inquiry, the determining tribunal, be it Judge or jury, will often find that the onus is sometimes on the side of one contending party, sometimes on the side of the other, or, as it is often expressed, that in certain circumstances the onus shifts. But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no sure conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a deter-

minate conclusion, the onus has nothing to do with it, and need not be further considered. That seems to their Lordships the case here. After reviewing the evidence as to capacity the learned trial Judge says:

the result of this evidence pieced together; dovetailed together, combined and considered as a whole does not make me think that there was anything which would affect the mind or which would show the incapacity of the late E. C. Walker to make his will when he did.

The Court of Appeal first stated the grounds put forward by the appellant for the reversal of the judgment of the trial Judge, thus:

that the evidence established that the testator was not mentally capable of making a will at the time when the alleged will was executed.

and after examining the evidence it concludes thus:

the plaintiff clearly fails upon the first of his grounds for the reversal of the judgment.

There is a passage at the beginning of the trial Judge's judgment which shows that on the question of onus he agreed with what had been laid down by the Court of Ontario, and the appellant argued that the learned Judges of the Court of Appeal must be presumed to have had the same views, and that, consequently, the whole judgment was vitiated by this wrong view as to onus. But, as has been already explained, there was no question of onus in the determination as it came to be made. It was a considered result of the evidence, and onus as a determining factor never arose for the learned Judges could, and did, come to a positive conclusion on the evidence laid. Learned counsel laid stress on the fact that the trial Judge expressed the result of his view in a negative fashion:

The evidence does not make me think that there was anything which would show the incapacity of the testator.

And he argued that that was no positive finding of capacity as the authorities require. The learned Judge was not dealing with onus. He was stating a result in ordinary English, and to say that the above sentence was not a positive finding of capacity seems to their Lordships as out of the question as to say that if one said of a man that he was not dead on a certain date there was no finding that he was alive.

Their Lordships therefore think that the attempt to avoid the effect of the concurrent finding rule fails. Much was sought to be made of the unfair way in

(6) 52 O. L. R. 479.

which the appellant argued the trial Judge had treated the evidence of a certain Dr. Shurly. Some of the criticisms he made do not particularly recommend themselves to their Lordships, but in the end he came to his result on a consideration of the whole evidence. That the Court of Appeal looked at the evidence in rather a different way matters not, for the rule is a rule as to concurrent findings, and not a rule as to concurrent reasons. Thus in *Ram Anugra Narain Singh v. Chowdhry Hanuman Sahai* (7) the judgment of their Board states :

The rule (as to concurrent findings) is none the less applicable because the Courts may not have taken precisely the same view of the weight to be attached to each particular item of evidence.

No question of this sort arises as to the procuring of the will by fraud or undue influence, because it is admitted that in that case the onus is always on the person who attacks the will. See *Craig v. Lamoureux* (8).

In their Lordships' opinion the rule as to concurrent findings clearly applies in this case, and the appeal falls to be dismissed. A petition was lodged for the admission of new evidence. This application had been made to the Court of Appeal and refused. Their Lordships will be slow indeed to interfere with the decision of the local Court on what is really a question of discretion and procedure. This petition therefore falls to be dismissed with costs.

Their Lordships will humbly advise His Majesty in accordance with the above opinion. The appellant will pay the costs of the appeal.

D.D. *Appeal dismissed.*

Solicitors for Appellant—*Collyer-Bristow & Co.*

Solicitors for Respondents—*Blake & Redden Freshfields, Leese & Munns.*

** A. I. R. 1927 Privy Council 70

[From Madras : see A. I. R.
1922 Mad. 510 (2)]

14th February 1927

LORDS PHILLIMORE AND DARLING,
MR. AMEER ALI AND SIR LANCELOT
SANDERSON.

Sathappa Chetty and others—Appellants.

v.

S. N. Subrahmanyan Chetty and others
—Respondents.

Privy Council Appeal No. 46 of 1924.

** (a) *Civil P. C., O. 1, R. 10—Partnership—Suit for dissolution—Person who together with the firm forms a superior partnership is not a necessary party.*

In a suit for dissolution of partnership and accounts, a person who was not in partnership as a member of the firm, but possibly in a superior partnership of which he was one side and the whole firm as a unit was on the other side, is not a necessary party. [P 71 C 1]

* (b) *Contract Act, S. 253—Dissolution.*

Filing plaint in a suit for dissolution by one partner is enough of itself to put an end to a partnership at Will. [P 71 C 2]

A. M. Dunne and K. Brown—for Appellants.

G. R. Lowndes and K. V. L. Narasimham—for Respondents.

Lord Phillimore.—The contention of the appellants has been ably put before their Lordships; but in their view it fails.

In this case five Chetti families formed, in April 1902, an oral partnership at Will for the purpose of conducting a banking and money-lending business in Burma, they being themselves resident on the continent of India. The plaintiff and his children formed one of the families and it will be convenient to treat the representative held as the single party in the judgment which their Lordships are giving. He held six and a half out of ten shares. Only 30,000 rupees were paid in as capital; but it was one of the terms of the arrangement that the plaintiff should be called upon and he prepared to lend further sums at a specified rate of interest. Business was carried on by agencies and the first agent was one of the partners, the third defendant. He did not manage well and by 1907 there had been very great losses.

(7) [1903] 33 Cal. 303=30 I. A. 41=7 O. W. N. 225=5 Bom. L. R. 6=8 Sar. 409 (P. C.).

(8) [1920] A. C. 349=89 I. L. J. P. C. 22=36 T. L. R. 26

After that time very little money-lending business was done; it gradually diminished and finally ceased, other agents being appointed, whose principal occupation was to get in the debts. The plaintiff advanced very considerable sums of money and it is obvious and had been obvious for a considerable time that, if and when the partnership came to an end, or whenever it should come to an end, the only question would be how much the defendants would have to pay to the plaintiff. It is quite clear that there will be a considerable loss. It is quite clear that the plaintiff will not get back a great portion of his advances. He will himself have to contribute six and a half shares out of the ten shares of the loss, but he will be entitled to something more or less, unless he is barred by the Limitation Act, from the other defendants.

On 3rd January 1910, the present plaintiff and the first defendant sued the third defendant, making the other partners also parties, to recover the loss which his mismanagement was supposed to have produced. He set up that it was a partnership matter and that nothing could be determined against him until the accounts of the partnership were taken, and the Subordinate Judge agreed with him on 5th December 1911, and dismissed the suit. The High Court affirmed this and dismissed the appeal on 21st January, 1915.

On 6th March 1917, the plaintiff instituted the present suit against his four other partners and their sons, claiming a dissolution of partnership and accounts and consequential relief, including a Receiver to get in such assets, if any, as are still outstanding.

The defence raised two points: one which can be disposed of at once, that there was a partner called Neelamegam, who was a necessary party to the suit. The Subordinate Judge thought he was; the High Court thought he was not; that he was not in partnership as a member of the firm, but possibly in a superior partnership of which he was one side and the whole firm as a unit was the other side. In their Lordships' view that is right and that settles the question; he is no necessary party to an internal suit between the five members of the unit which formed the partnership with him.

That leaves the question of the Limitation Act. In the view of the Subordinate Judge this partnership had been dissolved considerably more than three years before the date of the institution of the present suit. In their Lordships' view this was not so; in their view there never had been any dissolution until the plaintiff, by the present suit, by his writ and plaint claiming dissolution, intimated his will to dissolve which of itself is enough to put an end to a partnership at will. Their Lordships think that the Judges of the High Court were right. It is clear that up to some stage in the previous suit the parties were urging, and successfully urging, that the partnership was still subsisting. On one view that may be said to be the case up to the date of the appeal judgment in 1915, which if so is within the period of limitation; but, even if that view be not taken, there is no definite date upon which the defendants can put their fingers successfully as a date at which the partnership was dissolved, and, when their Lordships come to consider the business which lies at the root of the whole matter, it stands in this way: The plaintiff ought at some time or other to recover some moneys from the other parties. If the partnership was put an end to some years ago his rights arose then and either the parties ought at once to have contributed such a sum as would make up to him his share of the loss, or they ought to have in some way disposed of the remaining assets and then met the remainder of the loss by their contributions. But no one at the time suggested this. On the other hand they were entitled to say to the plaintiff:

"Until all the assets are realized we cannot tell how much we owe to you, and we claim not to pay you anything until all the assets are realized."

If so, for that purpose the partnership went on; it went on, not because it would do any more business, until those assets were realized, the final dissolution of the partnership could not take place. For this and for the other reasons given by the learned Judges in the High Court their Lordships are of opinion that their decision was right, and they will humbly advise His Majesty that this appeal be dismissed with costs. The judgment of the High Court, remitting the case with

72 **Privy Council** PUNJAB C. PRESS CO. v. SECY. OF STATE (Viscount Dunedin) 1927

directions to the Subordinate Judge in the circumstances appears to their Lordships to be the right one.

D.D. *Appeal dismissed.*

Solicitors for Appellants—*Hy. S. L. Polak.*

Solicitors for Respondents—*Douglas Grant and Dold.*

✱ **A. I. R. 1927 Privy Council 72**

[*From Lahore, A. I. R. 1924 Lahore 169 and A. I. R. 1924 Lahore 192 (1).*]

11th February 1927

VISCOUNT DUNEDIN, LORD SALVESEN,
SIR JOHN WALLIS.

Punjab Cotton Press Co. Ltd.—Appellants.

v.

Secretary of State—Respondent.

Privy Council Appeals Nos. 41, 39 and 40 of 1925.

✱ *Limitation Act, Arts. 2 and 36—Plaintiff's property suffering damage by canal being cut—Canal cut to avoid damage to adjacent railway—Art. 2 does not apply—Northern India Canal and Drainage Act (8 of 1873), S. 15—4 Lah. 428=79 I. C. 208 and 4 Lah. 432=79 I. C. 185, Reversed.*

Where the canal authorities cut the bank of a canal to avoid accident to the adjoining railway and not to the canal and plaintiff's adjacent mills were damaged.

Held: that Art. 2 was not applicable as the act alleged was not done in pursuance of any enactment: 4 Lah. 428=79 I. C. 208 and 4 Lah. 432=79 I. C. 185, Reversed. [P 73, C 1]

L. De Gruyther and Dube for—Appellants.

A. M. Dunne and K. Brown for—Respondent.

Viscount Dunedin.—These three suits have been consolidated and they have all been decided on the same plea by the learned Judges of the High Court at Lahore, but in truth they are in a different position, because the first suit was brought before the expiry of two years and the other two suits were not brought until the expiry of the two years, in other words, the first suit is not hit by the limitation of Art. 36 of the First Schedule of the Limitation Act, which reads as follows:

For compensation for any malfeasance, misfeasance or nonfeasance, independent of contract and not herein specially provided for, limitation two years.

But the two other suits are hit and therefore in so far as the two latter suits were dismissed, the judgment was

right, although their Lordships do not think it went upon the right ground, because it was put upon Art. 2 of the Limitation Act, instead of upon Art. 36. The first suit, however, was brought within two years, and, therefore, so far as limitation is concerned, it is either hit under Art. 2 or not at all. Art. 2 is:

For compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment for the time being in British India.

and the period is ninety days.

What is complained of here is that the Government, who are the people in charge of the canals, constructed a vast set of irrigation canals in the neighbourhood of the Ravi river. The Ravi river was prone to frequent floods and these canals not only acted as irrigation canals, but they also acted to a certain extent as relievers of the river in flood: but the river had been apt to flood to an extent which the canals could not relieve, and accordingly spilt water came upon certain land on either side of the canal and, at a certain place, in order to deal with this spilt water and let it away to the ordinary level of the country, the officials, first of all, cut three cuts through the canal at a place marked M. on the map (*not shown here*). The result of that was to let water down from one side of the canal, namely, the side nearest the Ravi river, to the other side and then down the water tumbled; then there became a great accumulation of water lower down and, in order to let that water away, the configuration of ground being such that the Ravi River at this place was in a position well to left of the canal, looking the way that the water is flowing, they recently cut two other cuts, letting the water back again to its old side next the Ravi river. They cut at a place which is marked A on the plan, a cut quite close to where the railway passes on a high embankment, and they did so as alleged really because they were afraid, if this accumulation went on, the railway embankment and the railway might be injured. The result of that, as the plaintiffs' say, was to injure their mills. It is quite clear that, upon the plaintiffs' showing, this was an act which the defendants performed at their own hands, and which, so far as statutes were concerned, they do not seem on the statement contained in the plaint in a

position to justify. No doubt, if they can show that what was done falls within the provisions of the Canal Act, that is to say, if they can show that it was really done, as S.16 (15 ?) of the Canal Act says, in order to avoid accident to the canal, then they will come straight within the clause already mentioned, Art. 2 of the Second Schedule. But their Lordships think the lower Court has strayed into an error, in that they have taken that as if it were proved against the averment of the plaintiffs. The plaintiffs' case as it stands does not show that the action was done for any purpose of protecting the canal, but only for the purpose of protecting the railway and letting the water away. Accordingly, a determination of it at this stage depending upon Article 2 cannot stand; but, at the same time, when the case goes back, the learned Judge of first instance having gone into the facts, if the High Court, on taking up those facts, consider that it is proved as a matter of fact that the operation was really for the protection of the canal and that, consequently, it falls within S. 16 (15 ?) of the Canal Act, no doubt the plea of limitation will apply. In other words, the judgment is not necessarily wrong in applying the plea of limitation under Article 2, but it is wrong, because it has applied it to a case which is contrary to what is averred by the plaintiffs before it has come to a determination on the facts. The case will, therefore, have to go back, and their Lordships will humbly advise His Majesty accordingly.

As there has been divided success, there will be no costs awarded to either party.

D. D.

Case remanded.

Solicitors for Appellants—*S. L. Polak.*

Solicitors for Respondent—*Solicitor, India Office.*

*** * A. I. R. 1927 Privy Council 73**
(From Calcutta: *A. I. R. 1925 Cal. 213*)

22nd February 1927

LORDS PHILLIMORE AND DARLING, MR.
AMEER ALI, AND SIR LANCELOT
SANDERSON.

Banku Behari Chatterji—Appellant.

v.

Narain Das Dutt and others—Respondents.

Privy Council Appeal No. 79 of 1925,
Bengal Appeal No. 9 of 1924.

*** (a) Civil P. C., O. 34, R. 6—Several mortgagees having decrees in the same suit—Last mortgagee must not wait for previous mortgagees to take steps, to entitle him to personal decree—Right to personal decree accrues when final decree is made though personal decree can be made only after exhausting property by sale.*

There were several mortgages prior to that of the applicant for personal decree. A decree was passed in 1905. The applicant took no steps until 1919 as he waited for previous mortgagees to take steps:

Held, that after decree every party was an actor and could take steps to enforce the decree where the amount was ascertained and decreed and if the prior mortgagees were slow in exercising their rights so as to imperil the rights of the later mortgagee (the applicant) ought to have taken action earlier. It is no doubt true that he could not have got a personal decree until all the mortgaged properties have been exhausted, but that would not mean that the applicant for a personal decree could first wait till just short of 12 years before selling and then take another period just short of 12 years for a personal decree, since his right to a personal decree accrued along with his other rights when the final decree was made. If he wished to exercise the right to a personal decree in time he must also take timely steps for those proceedings which were necessarily preliminary. [P 74, C 2 P 75, C 1]

** * (b) Limitation Act, Art. 183—Application for transfer of decree is not revival of decree.*

An application for transmission of a decree from the High Court to the District Court is not by itself a revival of the decree within the meaning of the Act inasmuch as it is a mere ministerial act of an officer of the Court and not the judicial act of a judge: 43 Cal. 903 (F. B.) *Appr. A.I. R. 1925 Cal. 213, Affir.* [P 75, C 1 & 2]

G. R. Lowndes, B. Dube and K. Ali Afzal—for Appellant.

L. De Gruyther and E. B. Raikes—for Respondent.

Lord Phillimore.—This case involves two questions upon the Limitation Act. One Sarat Chunder Dutt effected four mortgages upon his various properties. The first encumbered two properties only; the second and third encumbered the same two properties and thirty-four others; the fourth, which has given rise to the present appeal, encumbered all thirty-six and nominally at any rate, some three others.

The fact that there were these additional properties might in one view have some bearing upon the points to be decided, and the counsel for the respondents insisted upon them; but in their Lordships' view they are so shadowy and uncertain that they may be thrown out of consideration in the present case.

The date of the fourth mortgage was the 21st December, 1900—the fourth mortgagee being the present appellant.

In 1903 the mortgagor partly paid off the fourth mortgagee by assigning to him certain mortgages valued at Rs. 35,000 in part satisfaction of his claim.

In 1901 the first mortgagee brought a suit on the Original Side of the High Court of Calcutta, making the three subsequent mortgagees and the mortgagor parties and obtained the usual preliminary decree on the 27th August 1902, in respect of his mortgage and the other mortgagors and a final decree on the 4th February, 1905.

In August 1905, the two properties, which were the subject of the first mortgage, were sold, and sufficient was realized to pay off the first mortgagee and leave some surplus.

In February 1917, the properties subject to the second and third mortgages, were sold, and their proceeds with the balance left from the previous sale about equalled what was due, possibly not quite enough to pay them. But apparently the second and third mortgagees were satisfied.

The fourth mortgagee took no further steps. In April 1919, the mortgagor died, leaving two sons, the respondents, Nos. 1 and 2, and on the 20th May 1919, the appellant, on the suggestion that the mortgagor was dead, that his two sons and his widow represented him, and that he had left property outside the limits of the original jurisdiction of the High Court, and within the jurisdiction of the District Court at Hoogly, made an application that satisfaction of his judgment might be entered in respect of the sum of Rs. 35,000, and that he might be at liberty to execute his decree for Rs. 82,725, being the balance of principal and interest against the widow and the two sons, and that for this purpose the proper papers should be transmitted to the District Court at Hoogly.

Upon this suggestion an administrative order according to the *cursus curiae* was made by the Registrar and supported by a certificate of a Judge stating that satisfaction had not been made of the full judgment debt, and that no order had been made in his Court for execution of the decree, and fixing the necessary costs of the certificate.

Thereupon the appellant applied to the Subordinate Judge at Hoogly for an order for sale of the properties within the jurisdiction which were alleged to have be-

longed to the deceased mortgagor, and notice of this application was given to the respondents and the widow.

Their proper course, there is no doubt, was to raise any objection they might have in the Court of the Subordinate Judge. Instead, however, of so doing they applied by petition to the High Court, raising among other points the following—that the widow was not liable as a representative of her deceased husband, that the properties sought to be seized and sold were not his at his death, but had been given to the widow, and they raised the question of the Limitation Act.

Thereupon by consent the order for transmission was amended by striking out the widow and modifying the claim against the respondents so as to make it clear that they would be only liable in respect of property of the deceased which had come to their hands, and the Registrar's order being so amended, the respondents withdrew from opposition to the order for transmission from the High Court to the District Court.

The case having thus got regularly into the District Court, the respondents then renewed their objection on the Limitation Act, and the Subordinate Judge delivered judgment against them, being of opinion that the decree-holder had not lost his right to have execution, but this judgment was reversed by the High Court; hence the present appeal.

Upon the first question to be decided, their Lordships have little doubt that the decision of the High Court was right. The article of the Act dealing with this question is thus expressed in tabular form: (See p. 75 for tabular form.)

The rights of the appellant to enforce the decree had all to be exercised within twelve years from its date; that is, twelve years from the 4th February 1905; and he took no step till 1919.

It is idle to say that he was waiting for previous mortgagees to take steps. After decree every party to a suit is an actor and can take steps to enforce the decree. And if this is true in other cases, so especially is it true when it is a case of a mortgagee, the amount of whose debt has been ascertained and decreed.

If the other mortgagees were so slow in exercising their rights as to imperi-

Description of Application.	Period of Limitation.	Time from which Period begins to run.
183.—To enforce a judgment decree or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction, or an order of His Majesty in Council.	Twelve years.	When a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right : Provided that when the judgment, decree or order has been revived, or some part of the principal money secured thereby, or some interest on such money has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person liable to pay such principal or interest, or his agent, to the person entitled thereto or his agent, the twelve years shall be computed from the date of such revivor, payment or acknowledgment or the latest of such revivors, payments or acknowledgments, as the case may be.

his, he ought to have taken action earlier.

Then it is suggested on his behalf, that he could not have a personal decree till all the mortgaged properties had been exhausted by sale. This is true, but it does not mean that he could first wait till just short of twelve years before selling and then take another period just short of twelve years for a personal decree.

His right to a personal decree accrued (to use the words of the Act) along with his other rights, when the final decree was made. If he wished to exercise it in time, he must also take timely steps for those proceedings which were a necessary preliminary.

The second question is more difficult, and their Lordships have been in considerable doubt about it. But upon the whole they think that the decision of the High Court cannot be disturbed.

The circumstances of the case are very special and not likely to occur again. It was decided by the High Court of Calcutta in the case of *Chutterput Singh v. Sail Sumari Mull* (1), a Full Bench decision of the year 1916, that an application for transmission of a decree from the High Court to a District Court was not by

itself a revival of the decree within the meaning of the Act inasmuch as it was a mere ministerial act of an officer of the Court and not the judicial act of a Judge.

Their Lordships have considered that case, and they think that it was rightly decided. But it is said that in the present case the action of the respondents in applying by petition to the High Court, and thereafter agreeing to the consent order, took the amended order of transmission out of the class of ministerial orders and made it a judicial order. Their Lordships will examine this contention.

Under the present and regular practice the judgment-debtor has no notice of the application for the order of transmission. His first information is when he gets a notice from the Court to which the case has been transferred and is required to show cause why the decree should not be executed by that Court against him. But as it appears from the narrative in the case cited, there was at one time a procedure in the High Court of Calcutta, a procedure not authorized by the Code, under which the judgment-debtor had notice of the application for transmission and presumably could appear and oppose it.

(1) [1916] 43 Cal. 903=20 C. W. N. 889=36 I. C. 602=23 C. L. J. 645 (F.B.).

76 Privy Council W. R. DOUGHTY v. COMM. OF TAXES (Lord Phillimore) **1927**

Possibly the practitioner in the present case had this idea in mind; but he was mistaken, and he went near to imperil his clients' case.

It remains however, that the order of transmission would be rightly made ex parte and as a ministerial act.

Treating it otherwise, the practitioner raised all the defences which he could and should raise at the later stage. Then by consent, the instrument of transmission was rectified in certain particulars. First of all the widow was struck out. The omission of her name did not concern the other respondents and may be taken as her objection and not theirs. Secondly the order was amended and rightly amended to show that the respondents were only liable to the extent (if any) of the property within the district which had come to their hands.

This was little more than putting the order for transmission into the correct form, in which it ought to issue, leaving all objections of substance to be raised in the district Court.

Then it is said that the instrument professes to be an order, and reliance is placed on the words "it is ordered that the said defendant . . . be at liberty to execute the said decree," and it is said that those words are repeated in the amended form, as the result of the consent order.

To this the answer made in the Court below seems sufficient. Accompanying the order of transmission and a necessary companion to it is the certificate of the judge of the High Court, and he certified that "no order had been made by this Court for execution of the said decree."

In the view of the High Court, the operation of the consent order was limited to the removal of certain preliminary objections which, strictly speaking, the respondents should have urged in the District Court, but which having been urged in the High Court, became an obstacle to be removed, and which the decree-holder was glad to have removed, but which could only be removed from the file of the Court by a consent order.

Their Lordships are unable to dissent from this view, and their Lordships will therefore humbly advise His Majesty

that this appeal should be dismissed with costs.

D.D.

Appeal dismissed.

Solicitors for Appellants—*W. W. Box & Co.*

Solicitors for Respondents—*Walkins & Hunter.*

*** * A. I. R. 1927 Privy Council 76**

(From New Zealand)

21st January 1927

THE LORD CHANCELLOR, LORDS SHAW,
WRENBURY, PHILLIMORE AND
BLANESBURGH.

William Richard Doughty—Appellant.

v.

Commissioner of Taxes—Respondent.

Privy Council Appeal No. 92 of 1926.

** * Income-tax—Sale of whole concern shown as at profit—Profit is not taxable in all cases—Company.*

Income-tax being a tax upon income, the sale of a whole concern which can be shown to be a sale at a profit as compared with the price given for the business, or at which it stands in the books, does not give rise to a profit taxable to income-tax. [P 78, C 1]

It is easy enough to follow out this doctrine where the business is one wholly or largely of production, e. g., dairy-farming business or a sheep-rearing business, but where a business consists entirely in buying and selling goods, it is more difficult to distinguish between an ordinary and a realization sale, the object in either case being to dispose of goods at a higher price than that given for them, and thus to make a profit out of the business. In such a case, a profit made by the sale of the whole of the stock, if it stood by itself, might well be assessable to income-tax. But the case is different where the sale is only a slump transaction: *J. and M. Craig (Kilmarnock) Ltd. v. Inland Revenue* (1914 S. C. 388, Appl.) [P 78, C 1, P 85, C 2]

A. M. Latter, M. Myers and C. L. King—for Appellant.

C. J. W. Farwell, F. O. Langley and Miss Joan Clarkson—for Respondent.

Lord Phillimore.—This is an appeal from the judgment of the Court of Appeal of New Zealand reversing the decision of Stout, C. J., on an application by the Commissioner of Taxes seeking to

assess the appellant to income-tax in the sum of £6,010 in respect of income for the year ending on March 31st, 1921.

On the proceedings taken in respect of this assessment a case was stated by the Commissioner which, according to the practice in New Zealand, was traversable and was accordingly traversed by the present appellant in his answer, and the matter came in the first instance before a Magistrate and was decided in favour of the Commissioner. His decision was, however, appealable both on grounds of fact and law to a Judge of the High Court, in this case Stout, C. J. The

<i>Liabilities</i>	£	s.	d.
Capital account ...	48,774	12	0
Sundry creditors ...	10,266	17	5
Deposits at interest ...	2,238	7	6
Bills payable current ...	36,053	12	2
	£97,433	1	9

decision of the C. J. is final on fact, but not on a matter of law.

The circumstances are these: The appellant and one Arthur John George carried on business at Wellington as wholesale soft goods merchants and drapers in partnership. On the 25th June 1920 they converted their partnership into a private limited company, of which they were the only two shareholders. The company had a nominal capital of £175,000 in £1 shares 100,000 of which were ordinary, 25,000 were A preference shares and 50,000 were B preference shares.

The arrangement, which was embodied in an agreement dated 25th June 1920 was that the partners as vendors should sell to the company and the company should purchase as from 20th January then past, the goodwill of the business, the leaseholds, plant, machinery, book debts, the benefit of pending contracts, all cash bills and notes, and generally all property to which the vendors were entitled in connexion with the business.

Part of the consideration for the sale was the allotment to the vendors of £76,000 paid-up shares, £30,000 ordinary shares to George and £30,000 to the appellant, and £16,000 B preference

shares to George. The residue of the consideration was the undertaking by the company to satisfy all the liabilities and engagements of the firm.

The vendors contracted not to carry on the business of a draper independently of the company, and they stated that they had in certain proportions subscribed the Memorandum of Association for all the 175,000 shares in the company, each thus according to his proportion rendering himself liable to that extent for the debts of the company.

The last balance sheet of the old partnership stood as follows:

<i>Assets</i>	£	s.	d.
Furniture and fittings ...	513	18	4
Cash at bank ...	106	11	3
Cash on hand and customs	432	7	11
Sundry debtors ...	45,151	17	0
Bills receivable current ...	5,896	3	3
War loans ...	1,974	12	6
Stock in hand ...	43,357	18	10
	£97,433	9	1

This should be corrected in one respect as £7,800 was due for unpaid income tax, thereby reducing the capital account from £48,774 12s. 0d. to £40,974 12s. 0d.

The partners having fixed the price at which they sold, if it could be called a sale, their business to the company, it remained to adjust the figures on the last balance sheet in accordance with this arrangement, £76,000 being evidently more than the sum standing to the credit of the capital account; and, in order to effect this, the item on the asset side "stock in hand £43,357 18s. 10d." was replaced by an item "stock and goodwill £78,383 6s 10d."

It appears from the evidence of the accountant who made out these accounts that he suggested that the figure for goodwill might be taken as £20,000, and that this view was accepted by the outgoing partners. This left as the residue of the item £58,383-6-10, or £15,025-8-0, as the difference between the value of the stock-in-trade as shown in the partners's last balance sheet and the value of the stock-in-trade as it might be deemed to be taken over by the company; and the Commissioner for Taxes claimed that this was a profit and to levy income-tax upon it.

By the law of New Zealand each partner is severally liable to tax in respect of his share of the profits of a partnership, and the appellant Doughty's share of this supposed profit was fixed at £6,010, in respect of which he was assessed to income tax as already stated.

The appellant puts his case in two ways: he says (1), that if the transaction is to be treated as a sale, there was no separate sale of the stock, and no valuation of the stock as an item forming part of the aggregate which was sold; and (2), that there was no sale at all but merely a re-adjustment of the business position of the two partners, and an application for their benefit of the law of New Zealand allowing the formation of private companies with limited liability.

Income-tax being a tax upon income, it is established that the sale of a whole concern which can be shown to be a sale at a profit as compared with the price given for the business, or at which it stands in the books, does not give rise to a profit taxable to income-tax.

It is easy enough to follow out this doctrine where the business is one wholly or largely of production. In a dairy farming business or a sheep-rearing business where the principal objects are the production of milk and calves or wool and lambs, though there are also sales from time to time of the parent stock, a clearance or realization sale of all the stock in connexion with the sale and winding-up of the business gives no indication of the profit (if any) arising from income; and the same might be said of a manufacturing business which was sold with the leaseholds and plant, even if there were added to the sale the piecegoods in stock, and even if those piecegoods formed a very substantial part of the aggregate sold.

Where, however, a business consists, as in the present case, entirely in buying and selling, it is more difficult to distinguish between an ordinary and a realization sale, the object in either case being to dispose of goods at a higher price than that given for them, and thus to make a profit out of the business. The fact that large blocks of stock are sold does not render the profit obtained anything different in kind from the profit obtained by a series of gradual and smaller sales. This might even be the case if the whole stock was sold out in

one sale. Even in the case of a realization sale, if there were an item which could be traced as representing the stock sold, the profit obtained by that sale, though made in conjunction with a sale of the whole concern, might conceivably be treated as taxable income.

But upon the evidence in this case, it would appear that no such separate sale was effected. It was a transfer of all the assets of the partnership for 76,000 shares, some preference, some ordinary, all taken at their face value of £1 each, with an obligation measured by a number of shares not paid up, to discharge the liabilities of the partnership. If these several items were not worth £76,000, then the shares were not worth their face value. Then as the vendors were the takers of the shares they would gain nothing. They may have estimated in June that their stock was in the previous January worth more than the sum at which it had been put in their balance sheet, but they did not, by so estimating it, make it more.

So far as the matter is a question of fact the judgment of the Chief Justice was conclusive, and if the question be to any extent a question of law, their Lordships desire to express their agreement with the conclusion drawn by the Chief Justice.

The authorities to which their Lordships have been referred, when carefully examined, show where the distinction is to be drawn between capital sales and sales producing income.

Some of these authorities are cases in which a company is dealing with land. In *The Commissioner of Taxes v. Miramar Land Co. Ltd.* (1) a company was formed for the purpose of dealing in land; and it acquired one property, of which it immediately sold a small portion, and a few months afterwards sold the rest in one block, and then it went into liquidation. It was held that the business of the company was one of dealing in land, and that the profit ultimately acquired was none the less a profit upon dealing, because, when the last part of the profit was acquired, the company ceased from carrying on business.

So in the case of *The Californian Copper Syndicate v. Inland Revenue* (2)

(1) [1907] 26 N. Z. L. R. 723.

(2) [1901] 5 Tax. Cas. 159=Vol. 6, Scotch Sess. Cas. 5th Series, 894.

a company formed to buy copper-bearing land in County California, bought the land for cash, improved it, and then re-sold it in two portions to the Fresno Company for 300,000 shares of the nominal value of £1 each. The whole capital of the Fresno Company was 400,000 shares, of which 75,000 were subscribed for in cash, 300,000 went to the Californian Company, and 25,000 were unallotted. It was held that the transaction was a sale in the line of the company's business, resulting in a profit, and not a mere change in the mode of investment, and therefore that the profit was taxable to income-tax. In that case the Primary Commissioners said that it seemed clear to them that the property had been bought in order to be sold.

On the other hand, in *Tebrau (Johore) Rubber Syndicate, Ltd., v. Farmer* (3), this case was distinguished, and the particular transaction in this latter case was held to be a case of appreciation of capital and not one resulting in a profit taxable to income-tax. The facts were that the company was formed to purchase land in Malay and develop it by cultivating rubber trees. Two estates were bought, and much planting had been done; but the capital was insufficient, and the undertaking was (after existing for rather more than a year) sold to a second company (the old company being wound up). The consideration for the sale was £2,500 in cash and 36,000 £1 shares of the new company. It was held that the first company was not formed to deal in land as a business, and that this was a case of realization of an investment.

Then there are some difficult cases where the business is anent breeding stock. In the Australian case of *The Commissioner of Taxation for Western Australia v. Newman* (4), a pastoralist put an end to his business and sold the whole station with stock and plant as a going concern, and it was held that the transaction was not the carrying-on of a business, but the winding-up of a business, and that the profit made on the winding-up was not a profit taxable as income; and in another Australian case, *Hickman v. Federal Commissioner of Taxation* (5), another pastoralist who

put an end to his business and sold his property, with all the improvements and the cattle upon it, was held not to be liable to the war-time profits tax in respect of the moneys realized by the sale of his cattle, even though in that case a separate price was realized for the cattle. It is stated in the judgment of Stout, C. J., that these cases have been since covered by legislation.

In the case of *Anson v. The Commissioner of Taxes* (6) the view of the Court was that Anson, who carried on a sheep farm, was carrying it on as a dealer in buying and selling sheep, and the Court said:

Every individual animal (with the negligible exception of the rams kept for breeding purposes) is part of the taxpayers' stock-in-trade. It is true that he does not, while his business is carried on, sell all his stock-in-trade at once; he always retains a part thereof. But in this respect his business is not different from that of other merchants. In the case of most trades it is only when the business is wound up or transferred that the entire stock-in-trade is disposed of. Normally a trader retains and carries over to the succeeding year a standard quantity of stock. But this permanent quality does not for that reason cease to be stock-in-trade

This being so, in the view of the Court it did not make any difference whether the stock-in-trade was sold progressively or all at once by way of clearing sale or otherwise in connexion with a transfer or a winding-up of the business. Whether his profit was derived from a single sale of all his stock-in-trade at once, or from repeated sales in the ordinary way of his business, his profit was taxable income, and was assessable accordingly.

In that case the item of profit was arrived at by taking the value of the stock as it stood in Dr. Anson's books for one year and comparing it with the same item of value in the previous year, and it seems to have been assumed that this particular piece of farming could be treated by itself, and that all the items of buying and selling of animals and profits, if any, from sale of wool, with the per contra item of wages and fodder and such like, could be taken as balancing each other, so that the difference between the values of the sheep stock in the two years represented the actual profit.

It would be difficult to arrive at the profit in this way if it were the case of

(3) [1910] 5 Tax. Cas. 658.

(4) [1921] 29 Commonwealth L. R. 484.

(5) [1922] 31 Commonwealth L. R. 232.

(6) [1922] N. Z. L. R. 330.

a farmer in England ; but the trade of a pastoralist is one with which the New Zealand Courts would be familiar, and which it would be more easy for the New Zealand Judges than for their Lordships to appreciate.

The reported cases on this branch of income-tax law are so involved in detail that it is not always easy to see on which side of the line they fall. The case of *The Commissioner of Taxes v. The Melbourne Trust, Ltd.* (7), is an authority for holding that in certain cases what seems like a distribution of assets, is in truth an application of profits. The case, however, nearest the present is that of *J. & M. Craig (Kilmarnock), Ltd. v. Inland Revenue* (8). There, on a transference from one company to another, one-third of the value of each item, other than stock-in-trade, as it stood in the books of the selling company, was treated as its value for transfer purposes, and the balance of a slump price, which, with an undertaking to discharge liabilities, formed the consideration, was inferentially attributable to the stock. It was held, however, in that case that no sum could be pitched upon as the actual price of the stock, and no claim to assess a profit could be based upon such a foundation.

Their Lordships would repeat that if a business be one of purely buying and selling, like the present, a profit made by the sale of the whole of the stock, if it stood by itself, might well be assessable to income-tax ; but their view of the facts (if it be open to them to consider the facts) is the same as that of Stout, C. J.—that is, that this was a slump transaction.

The other ground on which the appellant's case may rest is that the transaction which led to the claim for tax was not a sale whereby any profit accrued to the two partners. The case of *Craig* just referred to is an authority for saying that the Crown is not entitled to take a mere book-keeping entry as conclusive evidence of the existence of a profit. The two partners made no money by the mere process of having their stock-in-trade valued at a high rate when they

transferred to a company consisting of their two selves.

If they over-estimated the value of the stock, the value of the several shares became less. The capital of the company would be to this extent watered. As already observed, they could not, by over-estimating the value of the assets, make them more.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, and that the judgment of Stout, C. J., should be restored, and that the appellants should have the costs below and of this appeal.

D.D.

Appeal allowed.

Solicitors for Appellant—*Shaen, Roscoe, Massey & Co.*

Solicitors for Respondent—*Mackrell, Maton, Godlee & Quincey.*

* * A. I. R. 1927 Privy Council 80

[From Madras : A. I. R. 1922 Mad.
236 (2)]

22nd February 1927

LORDS PHILLIMORE, CARSON, DARLING,
MR. AMEER ALI, SIR LANCELOT
SANDERSON.

Tadi Bulli Gangi Reddi—Appellant.

v.

Tadi Bulli Tammi Reddi and another
—Respondents.

Privy Council Appeal No. 174 of 1924.

* * (a) *Hindu Law*—*Alienation by manager for religious charity is valid, but it must be inter vivos and not by will: 45 Mad. 281, Reversed.*

A dedication of a portion of the family property for the purpose of a religious charity may, according to Hindu Law, be validly made without any instrument in writing, even if it be an appropriation of some landed property, and the act of the karta of the family would be validly assented to in any way, however informally, by the other members of the family. Such an appropriation may even (if the property allotted be small as compared with the total means of the family) be made by the karta without consent. But the appropriation or alienation must be made by the manager by an act inter vivos, and must not be an alienation *de futuro* by will: **45 Mad. 281, Reversed.** [P. 82, C. 1]

* * (b) *Hindu Law*—*Religious endowment.*

Where profits of a mortgagee were not all applied to charity but, were merely treated as the purse from which the expenses of the charity were met :

(7) [1914] A. C. 1001=111 L. T. 1010=30
T. L. R. 685=81 L. J. P. C. 21.

(8) [1914] S. C. 338.

Held: that there was no dedication of the mortgage to charity: 45 Mad. 281, Reversed. [P 84 C 1]

L. DeGruyther—for Appellant.

K. V. L. Narasimham—for Respondents.

Lord Phillimore.—This case turns on a question of fact. A member of the family of Reddi, whom it is convenient to call Gangi Reddi, was a merchant carrying on business at Cocanada. He died in April 1917. He had two sons, one of whom predeceased him, leaving a son the present plaintiff. The younger son and his son are the present defendants. There were also several daughters.

Gangi Reddi made three wills asserting that his property was self-acquired property, and being such that he could dispose of by will. It has, however, been decided that his property is to be regarded as ancestral family property, and not such as he could dispose of by will.

The youngerson had assisted his father in his later years and was, according to the will to be manager of the family property, and in fact he undertook to manage it and did so till this suit was brought on the 18th December 1918. By it the plaintiff's claim to a half-share of the entire family property was asserted and a partition was demanded.

The plaint contained various allegations of malversation by the first defendant.

When the case came on for trial a number of questions arose which were disposed of by the Subordinate Judge. Most of his directions were confirmed by the High Court on appeal. In the cases in which the judgment of the Subordinate Judge was so varied the decision of the High Court has been generally accepted. The only point remaining is that which is the subject of the present appeal.

The earlier clauses of the will provide for certain distributions between the wife, and sons and daughters which are either not questioned or have been disposed of by the judgments already mentioned. The last clauses of the will run as follows:

7. I advanced a loan to Muchilika Appalaraju and others of Chengondapalli, Ernagudem taluk, took a usufructuary mortgage of Chengondapalli and its hamlets Patuam Madampatti, etc., forming a muttah belonging to the said Appalaraju and others and have been managing the same. The net profits realized from the said muttah annually, I have been giving away for the expenses of feeding, etc., in the choultry

which I built in Gollalamamidada and have been making credit and debit entries accordingly in the accounts also. So long as the said Chengondapalli muttah is in our possession according to the term, the net profits annually realized therefrom shall be paid for the expenses of the said choultry even after my death, and Bulli Thammami Reddi shall look after the whole management needed for it. Besides this, the interest that may annually be realized on a sum of Rs. 10,000, (ten thousand rupees,) out of my own funds shall either be spent to meet the expenses of the charity choultry at Gollalamamidada once a year or shall be kept in deposit for the said purpose.

8. The will already executed by me on 13th May 1906, and registered as No. 12 on pp. 111 to 114 of Vol. 3, Book III, in the office of the Sub-Registrar of Bikkavole is hereby cancelled and this will has been executed to take effect from the time of my death. This will is executed with my consent.

It has been stated that Gangi Reddi claimed that his property was all self-acquired. He asserted this claim in the first paragraph of the will in question; but as it has been decided that this claim was not well founded he could not dispose of his property or found a charitable endowment by will. In the present suit the plaintiff disputed the validity of this endowment, and the first defendant supported it.

Originally the defence rested upon the proposition that the property was self-acquired; but during the progress of the case the first defendant was allowed to raise further defences, namely, that there had been a dedication to charity during the lifetime of Gangi Reddi, and that the plaintiff's father and other persons interested had acquiesced in the dedication. As regards the sum of Rs. 10,000 the Subordinate Judge upheld this dedication while in respect of the usufructuary mortgage he held that there was no dedication. As regards so much of the charity as he held to be validly founded, the Judge directed that the management should be with the two branches of the family in alternate years varying in this respect the direction in favour of the first defendant which appears in the will.

The plaintiff accepted this decision, and so it must be taken as settled that there was a valid constitution of a charitable endowment to the extent of the Rs. 10,000. The first defendant was not content with the other part of the decision and appealed to the High Court, which decided that there was an appropriation of the usufructuary mort-

gago as well as of the Rs. 10,000 to the charitable endowment.

It is from this decision that the plaintiff now appeals.

It is much to be regretted that the first defendant has not seen his way to be represented before their Lordships; but the facts of the case have been fully presented by counsel for the appellant, and every portion of the evidence on the record has been brought to their Lordships' notice.

A dedication of a portion of the family property for the purpose of a religious charity (and the charity which Gangi Reddi purported to endow is of this nature) may, according to Hindu law, be validly made without any instrument in writing, even if it be an appropriation of some landed property, and the act of the karta of the family would be valid if assented to in any way, however informally by the other members of the family. Such an appropriation may even (if the property allotted be small as compared with the total means of the family) be made by the karta without consent. This much was not questioned by counsel for the appellant.

But the appropriation or alienation must be made by the manager by an act *inter vivos*, and must not be an alienation *de futuro* by will.

In the view of the Subordinate Judge the foundation, so far as the Rs. 10,000 was concerned, was supported by the principles above stated, but the other endowment was not. In the view of the High Court both stood upon the same footing.

The evidence in the case was somewhat meagre. The plaintiff gave evidence and had nothing material to depose on this subject, but he relied on entries in the family book of accounts. The first defendant said that his father wanted a choultry for Brahmins to be built, and that it had been located in its place for ten or fifteen years. The clerk in the service of the deceased verified the accounts and spoke as to a mortgage on an estate called Toyyeru, held in common by Gangi Reddi and another man named Basavi Reddi, the profits of which, so far as it came to Gangi Reddi, were used by him for the expenses of running the choultry, the balance or surplus being spent by Gangi Reddi on his own ac-

count. He further said that at a later date the usufructuary mortgage of Chegondapalli, spoken of in the will, was also acquired. In cross-examination he stated that there were separate khatahs or accounts relating to Toyyeru, Chegondapalli and the choultry kept in the ledger books, and that the expenses incurred for the choultry used to be debited to the choultry account from day to day.

This is all the material oral evidence, and it is meagre enough; but the first defendant, on whom lies the burden of supporting this endowment, offered some documentary evidence of importance.

Gangi Reddi, as it has been said, made three wills. The first, dated 13th July 1905, was confined to provisions relating to members of the family. In the second, dated the 13th May 1906 these words occur:

From after my death interest accruing on a sum of Rs. 10,000, (ten thousand rupees,) shall be paid once a year for the Dharma Chattram (charity house) situate in Gollalamamidada, and in the third will comes the clause already mentioned.

Now the third will states historically that he has been giving away the net profits of the usufructuary mortgage for the expenses of feeding, etc., in the choultry, and that he had been making credit and debit entries accordingly in the accounts, and then proceeds to direct that so long as the mortgage remains in the possession of the family the net profits annually realized shall be applied in the same manner.

This is not quite in agreement with the statement of the clerk, who speaks of a surplus or balance which was applied to the ordinary family expenses; but still there is the statement which is not to be neglected.

The other document of importance is a deposition which Gangi Reddi made on the 16th October 1903, that is, before any one of the three wills was made. It would appear that in that case he was suing upon a promissory note, and that the defence was that it was a forgery, and that this defence was supported by a suggestion that he had not money enough to be in a position to lend the sum, whenever it was said to be due on the promissory note.

Their Lordships would gather that the transaction had been effected by the

elder son who at the time of the deposition, had not been long dead, and that some difficulty may have arisen because he was dead at the time when the trial came on. In that deposition Gangi Reddi started by giving himself a character as a substantial person, and he said as follows :

I am plaintiff. I have been dealing for the last forty years. All this is my self-acquisition. I am illiterate. I am only a marksman. I earned my property by trade. I paid this year Rs. 265 or 275 as income-tax. I got about Rs. 3,000 from my lands. I endowed a choultry at Samarlakota for Rs. 10,000. I gave a leasehold right of the annual value of Rs. 1,200 for 25 years for a chatram in my village. My son asked me to endow the chatram for lame and blind people, with the interest accruing on Rs. 10,000 funded capital. I am going to do so hereafter. Basavi Reddy and myself are the biggest merchants of my village. There are no big merchants in my village who are not of my caste or in the neighbouring villages. For the last 10 or 14 years my son was carrying on all my affairs. I and Basavi Reddy are partners in the rice mill at Nidadavole. I had dealings with defendants. My son was conducting business on my behalf with the defendants.

He was cross-examined upon this statement, and he then said :

The lease right with which I endowed the choultry is held jointly by me and Basavi Reddi.

This deposition, it may be said, cuts both ways. It supports the statement that he had endowed a choultry, and further supports the endowment with Rs. 10,000. But if the leasehold right was held jointly with Basavi Reddi, it was the leasehold right of Toyyeru and not of Chegondapalli, which apparently he held alone, and the statement if it relates to Toyyeru, cannot be evidence of an unrevocable donation of that property, because no such case is now set up.

Neither Court in India seems to have noticed this. It agrees with the accounts and with the evidence of the clerk that at one time some of the profits of the Toyyeru mortgage were applied to support the choultry. If so it would be a temporary arrangement by which the deceased in that way applied at his pleasure portion of his income to the upkeep of the charity.

From the accounts it appears that some money was spent on the choultry at as early a date as 1897, and that the building was set up in 1899.

Down to the year 1900 such expenditure as was made upon the choultry was

debited in the Toyyeru account and not to the Chegondapalli account. This expenditure did not exhaust profits from Toyyeru, and the mode of accounting simply points to those profits as being used as the purse out of which the deceased made his charitable contribution.

After 1900 and until 1911 an account of the expenses on the choultry never amounting to more than a few hundred rupees a year, and much less than the receipts of corresponding date from the Chegondapalli mortgage, was regularly kept ; but there was no transfer of the debt to Chegondapalli, and no correlation between the two accounts till December 1911, when the sum of Rs. 8,400 for the charity and another sum of Rs. 11,240, being the loss on a particular trade, were both debited to the account of Chegondapalli, and even then left it in credit to the extent of Rs. 6,321. Such accounts as have been filed since that date are simply accounts kept contemporaneously for the two purposes without any correlation or transfer from one to the other.

These accounts support the appellant's case. They are inconsistent with any appropriation of the full net profits of the usufructuary mortgage to the purposes of the choultry. They do not even show any regular appropriation year by year of any fixed sum or indeed of the annual cost of upkeep fixed or unfixed, to the account of the charity.

Their Lordships, however, have been embarrassed by the view taken in both Courts as to these accounts. There is a passage in the judgment of the Subordinate Judge in which he says that there is

no doubt of the fact that in the Chegondapalli Khata the income was being shown as having been taken on to the account of the choultry in the account books maintained during the time of the late Gangi Reddi. This fact could not be denied on plaintiff's side. But the plaintiff's counsel contends that though expenses for a charity might be met from out of a particular property it cannot be held that that property was dedicated for the upkeep of the charity.

This looks at first sight like a finding that the whole proceeds of the usufructuary mortgage were applied to the benefit of the choultry, and if this were the case there must be some error in the presentation of the accounts as printed, some material omissions or some explanation

which, if the respondents had been represented by counsel would have been furnished. The result has been to necessitate very careful enquiry.

But as their Lordships have already noticed, there is an initial mistake in the judgment of the Subordinate Judge. He had failed to notice that the deceased in his deposition must have been speaking of the other estate. Further, when the passage of his judgment is more carefully scrutinized, it would seem that he had not thought it necessary to draw the distinction between meeting all the expenses of a charity out of a particular property, and applying all the receipts of that property to the charity.

His judgment, so construed, does not throw suspicion upon the accounts. As to the High Court, the learned Judges say :

It appears from the accounts that the income from the muttah was utilized for the expenses of the choultry from the date of its opening. The evidence shows that there was a dedication of the income from the muttah for the purpose of the upkeep of the choultry.

Much of this paragraph, as already observed, is founded on a mistake ; but be this as it may, their judgment is consistent with a view that the profits of the usufructuary mortgage were not all applied to charity ; but merely that they were treated as the purse from which the expenses of the charity were met.

This being so, the accounts and the evidence of the clerk really conclude the matter, and their Lordships must hold that there was no dedication of the Chogondapalli mortgage by any act *inter vivos*, and that the view of the Subordinate Judge was right ; and their Lordships will humbly advise His Majesty that the appeal should be allowed, and the judgment of the Subordinate Judge restored with the costs here and below.

D.D. . *Appeal allowed.*

Solicitors for Appellant—*L. DeGruyther.*

Solicitors for Respondents — *K. V. L. Narasimham.*

* A. I. R. 1927 Privy Council 84

(From Patna)

10th February 1927

LORDS PHILLIMORE, SINHA,
BLANESBURGH AND SIR JOHN
WALLIS.

Mt. Barkatunnissa Bejam—Appellant.
v.

Debi Bakish and *another*—Respondents.

Privy Council Appeal No. 169 of 1924,
from Patna Appeal No. 8 of 1924.

* (a) *Contract Act, S. 16*—*Mere need of money is no test of domination of will.*

The mere fact that the borrower is in need of money does not put a moneylender in a position to dominate the borrower's will within S. 16.

[P 86 C 1]

* (b) *Pardanashin lady*—*Nature of transaction must be looked to with other circumstances.*

The mere declaration by the transferrer, a *pardanashin lady*, subsequently made, that she had not understood what she was doing, obviously is not in itself conclusive. It must be a question whether, having regard to the proved personality of the transferrer, the nature of the transfer, the circumstances under which it was made, and the whole history of the parties, it is reasonably established that the deed executed was the free and intelligent act of the settlor or not. If the answer is in the affirmative, those relying on the deed have discharged the onus which rests on them. Of course, fraud, duress and actual undue influence are separate matters : *A. I. R. 1925 P. C. 201, Ref. [P 86 C 1]*

L. DeGruyther and *B. Dube*—for Appellant.

A. M. Danne and *S. Hyam*—for Respondents.

Sir John Wallis.—This is an appeal from a decree of the High Court of Patna varying the decree of the Subordinate Judge of Gaya, and giving the first plaintiff a mortgage decree as prayed. *Debi Baksh*, the first plaintiff, a minor, suing through his mother, the second plaintiff, as his guardian and next friend, and his deceased father, *Chainsukh Mal*, formed a joint Hindu family carrying on business as moneylenders and cloth merchants ; and the plaintiff alleged that the plaintiff's father had advanced Rs. 7,500 to the defendant from the joint family funds and taken from the defendant the mortgage sued on, which is dated the 11th November 1912, in the name of his wife, who was therefore joined as second plaintiff. The circumstances which gave rise to the transac-

tions were stated as follows: In November 1906, it was alleged, the first plaintiff's father had advanced Rs. 2,763 to the defendant, of which 2,500 was to bear interest at twelve annas per cent. per mensem, and Rs. 263 not to carry interest in consideration of her granting him a Zarpeshgi lease of certain lands for nine years at an annual jumma or rent of Rs. 263, of which Rs. 225, being 9 per cent., on the advance of Rs. 2,500, was to be retained by the lessee, and the balance of Rs. 38 was to be paid to the defendant. Under a lease of this nature the loan of Rs. 2,763 would have been payable at the expiry of the term of nine years, and the lessee would have been entitled to continue in possession on the same terms until it was paid. It was alleged, however, that in 1911 the first plaintiff became desirous of surrendering the lease and recovering the loan for certain reasons, and that the defendant agreed to accept the surrender in consideration of the first plaintiff lending her Rs. 7,500 on mortgage at 15 per cent. and compound interest, out of which sum the first plaintiff was to be paid what was due to him in respect of the Zarpeshgi advance, Rs. 2,374 was to be applied in paying out an execution-creditor of the defendant, one Gendan Singh, and the balance was to be paid to the defendant who required it for the conduct of suits which had been brought against her by Mt. Qamrunnissa, and by her against Amirul Hasan, her husband's nephew. It was further alleged that after discharging the Zarpeshgi debt and paying out the execution-creditor, the balance left, Rs. 2,647, was paid to the defendant in cash.

The defendant filed a written statement in which after denying that she had executed the mortgage or that it had been executed as required by S. 59 of the Transfer of Property Act, she pleaded as follows:

Your petitioner is a pardanashin lady, and is quite illiterate. She has certainly no capacity to understand transactions. She has long been separate from her husband. Her son, Saiyed Ithad Hussan, alias Baratu, has got a weak intellect and is unable to enter into transactions. It has been admitted by the plaintiffs that Rs. 2,500 bore interest at 12 annas per mensem. Had your petitioner really entered into transactions she would not certainly have agreed to pay interest at one rupee four annas per cent. per mensem on the said amount. From this it is evident that your petitioner did not certainly

understand transactions. The plaintiffs are not at all entitled to get interest at more than 12 annas per cent. per mensem even if the mortgage bond be proved to be genuine.

Issues were framed on these pleadings and the Subordinate Judge found on the first issue that the bond had not been duly executed as a mortgage, as he did not believe the attesting witnesses called for the plaintiffs, who spoke to seeing the defendant execute it. On the second issue he found that the consideration was proved as alleged in the plaint. On the third issue he found that the defendant did not understand the terms of the bond and its legal effect, and that they were not explained to her. On the fourth issue, whether the rate of interest and time of payment were unconscionable and penal, the Subordinate Judge observed the defendant would not have executed the deed if she had had independent advice and it had been explained to her, and he further held that her need for an advance put the plaintiffs in a position to dominate her will and that they had used it to obtain an unfair advantage.

He therefore refused to grant a mortgage decree or allow compound interest at the rate in the bond, but gave the plaintiffs a decree for the amount claimed with simple interest at 9 per cent.

The plaintiffs appealed to the High Court, and Das, J., who delivered the judgment of the Court, found that there was not sufficient reason for disbelieving the witnesses who spoke to the execution of the suit mortgage. Undue influence, he held, had not been proved. The fact that the defendant wanted money was not enough to put the plaintiffs in a position to dominate her will. He also found that the interest charged in the bond was not unconscionable, as it was the usual rate of interest charged on that class of transactions. With regard to the fact that the transaction was one with a pardanashin lady, he held that the document had been duly read and explained to her, and that it was a case in which it was not necessary that she should have had independent advice. The only question was as to the rate of interest, and that he found was settled after negotiation with the defendant herself. The appeal was accordingly allowed, and the decree varied by giving the plaintiffs a mortgage decree.

In their Lordships' opinion the finding of the Subordinate Judge that the mortgage was obtained by undue influence, on the ground that, owing to the defendant's need of money, the plaintiffs were in a position to dominate her will and used their power to obtain an unconscionable advantage was clearly erroneous. The mere fact that the borrower is in need of money does not put a money-lender, to whom she applies for an advance, in a position to dominate her will within the meaning of S. 16 of the Indian Contract Act. The only questions then that remain for consideration are: (1) Was execution of the mortgage the free and intelligent act of the defendant? (2) Was its execution by the defendant duly attested by witnesses who themselves saw her execute it as required by S. 59 of the Transfer of Property Act?

As regards the duty of persons who take transfers from pardanashin ladies to show that they not merely executed the document, but that they understood what they were doing, the law has been laid down in numerous decisions of this Board, and most recently in the judgment delivered by Lord Sumner in *Fairdun-nisa v. Mukhtar Ahmad* (1).

In their Lordships' opinion the way in which the present case should be approached is indicated in the following passage from that judgment:

The mere declaration by the settlor, subsequently made, that she had not understood what she was doing, obviously is not in itself conclusive. It must be a question whether, having regard to the proved personality of the settlor, the nature of the settlement, the circumstances under which it was executed, and the whole history of the parties, it is reasonably established that the deed executed was the free and intelligent act of the settlor or not. If the answer is in the affirmative, those relying on the deed have discharged the onus which rests upon them. Of course, fraud, duress, and actual undue influence are separate matters.

First of all, as to the transaction itself, it is said to have been so unfair that the defendant would never have entered into it if she had understood it, and therefore it may be inferred it was not explained to her. Instead of paying 9 per cent. simple interest on Rs. 2,500 under the lease, she was to pay 15 per cent. compound interest on Rs. 2,478-15 under the mortgage, and was also to allow the plaintiffs to take water from the lands which had been under lease to them for

their own lands, which apparently were lower than the defendant's lands. But, first, as pointed out by Das, J., the plaintiffs under the Zarpeshgi lease were not merely getting 9 per cent. on Rs. 2,500; they were obtaining a lease at an annual jumma or rent which, after deducting the interest due to them, calculated at 9 per cent., only left Rs. 38 payable to the defendant, so that in substance, in consideration of this advance, they were to enjoy the demised lands until the expiration of the term, and thereafter till repayment for an annual payment to the defendant of Rs. 38. As an advance on Zarpeshgi lease is more troublesome to the lender than an advance on simple mortgage at 15 per cent. compound interest, which, as found by the learned Judges, are the usual terms of lending money, it is not likely that the first plaintiff's father would have entered into the transaction unless he expected it to be at least as profitable as lending money on simple mortgage on the usual terms.

If the transaction be looked at in another way, it is not the fact that the defendant has merely had to pay 15 per cent. compound interest instead of 9 per cent. simple interest. As against the increased rate of interest she immediately became entitled to the full rents and profits of the demised land instead of to the Rs. 38, which was all she was receiving under the lease. This would be a point which would be calculated to appeal to a lady in the position of the defendant.

It was also suggested that the plaintiffs wanted to give up the lease because they were making a loss. This was denied by the plaintiffs' agent Phulchund, whose evidence on this point is uncontradicted. It was only natural that after Chainsukh's death Phulchund, his brother-in-law, who was in sole management on behalf of the first plaintiff, would have found it difficult to attend to the lease as well as to the family business.

As regards the right to take water: there is nothing about it in the mortgage deed or the plaint, and Phulchund, who spoke to it, was not cross-examined as to its extent. The plaintiffs had apparently been making a certain use of the defendant's sources for their own lands without objection during the lease, and would have been in a position to go on doing so till the expiration of the lease. It is not shown that the cultivation of

(1) A. I. R. 1925 P. C. 201=47 All. 703=52 I. A. 342 (P. C.).

the defendant's lands was in any way prejudiced thereby, and it does not seem unreasonable for the plaintiffs to have stipulated that they should have a license to go on doing so during the continuance of the mortgage which replaced the lease. On the whole there does not seem to have been any such unfairness in the plaintiffs' terms as to make it likely that the defendant would have rejected them if they had been explained to her.

The plaintiffs' evidence, however, is that not only were the terms of the deed repeatedly explained to the defendant, but that she took part in the negotiations and knew all about them.

As to the way in which the transaction came about, the mortgage deed itself contains recitals purporting to be made by the defendant herself, that the second plaintiff, as guardian of the minor first plaintiff, had sent word through her brother and agent Phulchund to the defendant, through her agents, that she was anxious to surrender the lease, as she was a pardanashin lady and could not properly manage the leasehold properties, and that the defendant, as she was in need of money, agreed to the surrender on condition that the plaintiff should make her a further advance of Rs. 5,500 and take a mortgage bearing interest from the defendant covering both the fresh loan and the money remaining due on the lease.

The deed then goes on to recite that these terms having been accepted, the defendant wrote a hukumnama, dated the 6th November 1912, affixing her signature and seal, and delivered it to the second plaintiff, and that the second plaintiff paid the defendant the arrears of rent due under the lease, in accordance with the wasilhaki dated the 12th Kartick 1320 (corresponding to the 6th November 1912). This wasilhaki, which is Exhibit 8, bears the defendant's signature by the pen of her son Baratu, and also her seal, and, as will be observed, is dated six days before the execution of the suit mortgage.

The evidence of Phulchund, the second plaintiff's brother, entirely bears out these recitals, and shows further that the preparation of the draft and the fair copy and the execution were in no way hurried. He deposed that, after Chain-sukh's death they could not manage the

village, and, as Baratu wanted a loan for his mother, he agreed to lend money at from Rs. 1-8-0 to Rs. 2 per mensem, on condition the defendant accepted the surrender of the lease. He said he also wanted water for Jaipur. Baratu told his mother and she sent for Phulchund, who asked if she agreed to these terms. She said she agreed to pay Re. 1-4-0 interest, to take back the lease, and to grant water. She also agreed to compound interest with yearly rests. Baijnath Sahib and a Miah and Baratu were present when the rate of interest was settled. Then in cross-examination, he said that he recognized the defendant when the talk about interest was going on. He proposed higher interest and compound interest. She higgled and settled Re. 1-4-0 and also agreed to compound interest, saying: "I agree since you get compound interest only if I default in payment for one year." Baratu and a Mahomedan servant were present at the spot.

As to the preparation of the draft, in his examination-in-chief, he said that two days after the agreement the draft mortgage deed was prepared by Mukhtar Yabar Hussain, Baratu called him, and caused the draft to be prepared. At the same time the witness asked for and obtained the wasilhaki already referred to, Ex. 8. Baratu, he says, signed the name of the defendant and put her seal to it in his presence. The draft was read over and the defendant agreed to its recitals. She wanted Rs. 100 (for the purchase of the stamp), and he gave them to her. In cross-examination he said he did not show the draft to anyone on his own behalf. He approved of it as there was nothing to object to. Yabar Hussain read it over to him and to the defendant. Two days afterwards it was fair copied and left in the possession of the defendant, and two or three days after it was executed.

In further cross-examination he said that when Yabar came the first time, Baratu called out the defendant and the defendant, in clear words, directed him to prepare the draft, saying that the village had become hers and that she wanted a loan. He also stated that, when the deed was fair copied, Baratu again called out his mother. Chedi Ram, the plaintiff's gomashtha, and first witness also speaks to the deed being fair copied

and read out to the defendant. In cross-examination he says, Baratu came to the shop and Phulchund sent Baratu and himself to call Yabar, and the deed was then fair copied in his presence in the defendant's house. Later on, he says, Phulchund was present and the deed was read out to the defendant after it had been fair copied, and it was left with Baratu.

Coming now to the evidence of execution, three of the witnesses who attested the deed were called and spoke to having seen the defendant execute it, and they are supported by Phulchund who was also present. The witnesses who had all been employed in the plaintiffs' business say they knew the defendant, as they had often seen and spoken to her when they took clothes to her house for inspection and sale in the usual way in India. They also say that they saw and heard on these occasions that it was she herself who gave directions as to the execution of the document, that it was read over to her and she said it was all right.

The first witness, Chedi Ram, says she stood behind a wooden jhilmili (or door with moveable bars, like a Venetian blind), whereas the other witnesses say she stood behind a chick or bamboo purdah, which one witness says was only nominal. The witnesses gave their evidence eight years after the transaction, and the learned Judges of the High Court came to the conclusion, with which their Lordships agree, that the discrepancy was not sufficient to invalidate their testimony. Chedi Ram, the plaintiff's gomastha, said the defendant and her son, Baratu, are clever persons and understand business and litigation. Phulchund also deposed that the defendant is a very shrewd woman and had the deeds executed read over to her two or three times before execution. Baratu also is a very clever man. They both understand affairs and litigation.

For the appellant some reliance was placed on the evidence of Mr. Warasat Hassain, a wakil, who had been the defendant's manager on a monthly salary of Rs. 100 and was called by the plaintiffs to prove the execution of the lease. He said in substance that the defendant was purdah to him and that he had not seen her either when she executed the lease in question or other documents, nor had he seen clothdealers selling to her directly.

He could not recollect if she gave directions from inside for attestation in the hearing of the witnesses. He was not asked as to the evidence of the previous witness, that the defendant was a very clever woman, but as regards Baratu, he said he was over thirty years of age, and was a man of very little reading. He seemed to be a weak-minded man, and the witness did not consider him capable of understanding litigation and supervising law suits. This witness was obviously anxious to help the defendant as far as he could, and his evidence does not contradict the rest of the plaintiff's evidence as regards this particular transaction.

In support of the defendant's case we have only the evidence of the defendant herself, which is obviously untrustworthy and entirely lacking in the corroboration which might have been expected. If the three witnesses did not really see her execute the deed, some of the other attesting witnesses might have been called to speak to this. With reference to her case that she was incapable of understanding transactions and that her son Baratu who according to the plaintiffs' case, helped in negotiating the loan, was a fool, some independent evidence of his want of capacity might have been given and he might have been called to enable the Court to judge. If he was not called, there was doubtless good reason for it. As regards her own alleged incapacity her answers in cross-examination suggest that she understood very well the hearing of most of the questions put to her, and was determined not to make any admission which would affect her case. The story that she signed whatever deeds were put before her by her servants and never troubled to inquire what became of the consideration which she admitted having received at the time of registration, is wholly incredible, having regard to her proved personality which according to the judgment cited is one of the factors to be taken into account in a case of this kind. The defendant is a Mahomedan lady who inherited from her mother a large estate which put her in a position of unusual independence. She was the sole wife of her husband, and when he formed an irregular connexion with another woman she left him, and brought a suit against him for alleged mismanagement of her properties. On

his part he tried unsuccessfully to make her return by suing for restitution of conjugal rights and then divorced her.

This certainly suggests that she was a lady of strong personality, and not at all likely to have left all her business in the hands of her servants, signed all the documents they put before her without explanation, and allowed them to do what they liked with the money paid to herself when the deeds were registered.

That she did not do so is further shown by her evidence in the suits for which she borrowed money on this deed. She was cross-examined as to her statement in Amir's case that Baratu never signed documents for her after Amir had left her, and the suit mortgage and wasilbaki Ex. 8, were filed in that case to contradict this. She was also questioned as to her deposition in that case:

I would not have admitted execution of the bonds executed after Amir left me without understanding the nature of the transaction and of the document and the amount of the debt, and the name of the creditor.

The last statement is quite inconsistent with her present case.

In their Lordships' opinion the plaintiffs have discharged the onus of showing that the deed was the defendant's free and intelligent act. The transaction when rightly understood was comparatively simple. The defendant was to get the further advance which she needed for the purposes specified and was to get back her lands and she was to execute a mortgage for the full amount of her indebtedness bearing interest at 15 per cent. with compound interest and yearly rests, the usual terms for such transactions and to give the plaintiffs certain water facilities by which it is not suggested she was prejudiced in any way in the seven years which elapsed between the execution of the deed and the filing of the plaint. The terms were negotiated between the plaintiffs and the defendant herself assisted by her son. There was no undue haste. The wasilbaki which was given when the draft deed was prepared, is dated the 6th of November and the deed was not executed until the 12th. The draft was read over to her then, and the fair copy was read over to her when it was made a few days later, and was again read over to her before execution and there can be no

doubt in their Lordships' opinion that she fully understood it.

The attestation has been duly proved in their Lordships' opinion as already stated, and therefore the appeal fails and should be dismissed with costs and their Lordships will humbly advise His Majesty accordingly.

D.D. *Appeal dismissed.*

Solicitor for Appellant—*H. S. L. Polak.*

Solicitors for Respondents—*Barrow Rogers & Nevill.*

A. I. R. 1927 Privy Council 89

(From Patna)

25th February 1927

LORDS PHILLIMORE, SINHA AND
BLANESBURGH AND SIR LANCELOT
SANDERSON

Maharaja Bahadur Keshava Prasad Singh—Appellant.

v.

Secretary of State—Respondent.

Privy Council Appeal No. 37 of 1925;
Patna Appeal No. 40 of 1923.

(a) *Bengal Alluvion and Diluvion Regulation (11 of 1825), S. 4—Land washed away by a river and re-formed in same place is not "gained" within S. 4, though land on opposite side of the river is owned by different owners—Riparian owners.*

Lands washed away and afterwards re-formed upon the old site, which can be clearly recognized, are not lands "gained" within the meaning of S. 4, Regulation 11 of 1825; they do not become the property of the adjoining owner, but they remain the property of the original owner. [P 93, C 1]

This principle also applies when the question is between two riparian owners, who own property on either side of the river, and when the land is washed away from one side of the river and re-formed on the other side and is re-formed on the old ascertained site: 1 *Marshall's reports* 136 and 13 *M. I. A.* 467 (P. C.), *Foll.*; 6 *I. A.* 211 (P. C.), *Expl. and Dist.* [P 93, C 2]

(b) *Riparian owners—Custom as to accretion was held not proved.*

There is no custom prevailing in the locality of District Shahabad in Bihar, that the deep stream of the Ganges is the boundary of the riparian estates and consequently all accretions to an estate by that local custom become a part and parcel of the estate to which accretions have formed. [P 96, C 2]

L. DeGruyther and E. B. Raikes—for Appellant.

A. M. Dunne and K. Brown—for Respondent.

Sir Lancelot Sanderson—This is an appeal by the Maharaja of Dumraon, who was the defendant in the suit, against a decree of a Division Bench of the High Court of Judicature at Patna, dated the 1st June 1923.

The suit was brought by the Secretary of State for India in Council to obtain a declaration of the plaintiff's title to certain lands called the Mahal of Turk Ballia, to recover possession of the said lands from the Maharaja, and for mesne profits.

The suit was tried by the learned District Judge of Shahabad, who made a decree in favour of the plaintiff dated the 19th December 1918. The High Court, by the above-mentioned decree of 1st June 1923, dismissed the Maharaja's appeal with costs.

The river Ganges separates the Shahabad district in Bihar from the United Provinces of Agra and Oudh. The Ballia district is to the north of the Ganges and the Shahabad district is to the south of the river.

The Mahal Turk Ballia, which consists of a single mouzah of that name, was settled with proprietors, other than the appellant, in the year 1790 as a separate estate, and in 1793 or 1795 was permanently settled and assessed to revenue at Rs. 251. It had a nominal area of 275 bighas, and at that time was situated to the north of the river Ganges.

Between 1871 and 1884 the land of this village was washed away by the Ganges, which was gradually moving northwards, until in 1884 the whole of the village had disappeared.

As the land of this estate became submerged in the river, proportionate remission of revenue was allowed, until at last the proprietors were paying a nominal sum of Rs. 2 per annum in order to preserve their right to the estate in the event of its re-appearing. In 1884, however, they were informed by the authorities that this payment was no longer necessary to keep alive their rights, and the Board of Revenue in the United Provinces directed that the payment of revenue should be suspended and written off from year to year in the revenue account. This was accordingly done in the revenue accounts of the collectorate.

As the river altered its position to the northward, accretions took place on the opposite bank in the Shahabad

district, and in 1909 correspondence took place between the respective collectors, from which it appeared that Turk Ballia had re-formed on the south side of the river.

Accordingly, by two notices issued in the Gazettes of the respective provinces, dated the 25th and 26th May 1910, it was formally notified that the permanently settled estate of Turk Ballia had ceased to form part of the Ballia district in the United Provinces, and that it formed part of the Shahabad district in Bengal (which at that time included Bihar) in respect of its civil, criminal and revenue jurisdiction.

It is not clear when the Mahal of Turk Ballia began to appear as dry land on the south side of the river. It would, in the natural course of things, be difficult to ascertain this with any accuracy; the learned Judges of the High Court stated that there could be little doubt that for some years after it emerged, as the river subsided after the floods, it would be again covered during the rainy season, and that it might reasonably be inferred that for some time after its emergence it would be sandy waste unfit for cultivation.

The learned Judge who tried the suit held on the evidence that it did not become cultivable before 1909, and the learned Judges of the High Court agreed with that finding. The above-mentioned date is material to the question whether the Maharaja had acquired a title by adverse possession as against the recorded proprietors when the suit was instituted, viz., on the 8th December 1916.

This question may be disposed of at once; the High Court held that no title was acquired by the appellant by adverse possession up to the date when the suit was brought, thus affirming the finding of the trial Court. The learned counsel who appeared for the appellant in this appeal stated during the argument that he accepted the two findings in this respect, and did not dispute them. Their Lordships see no reason for differing from the above-mentioned findings as to adverse possession.

The village of Turk Ballia having been placed on the rent-roll of the Collector of Shahabad, as appears from paragraph 7 of the appellant's case, notices were given to the original proprietors to pay

the arrears of revenue alleged to be due in respect of the said estate.

It further appears that no revenue from this estate was paid up to the end of the financial year 1910-1911; and on the 4th May 1911, when the revenue was in arrear for one year, notification for the sale of the Mahal of Turk Ballia for arrears of revenue was issued under the provisions of Act 11 of 1859. The Turk Ballia estate was put up for auction, and in the absence of bidders it was duly purchased by the Collector on behalf of the Government.

The Collector of Shahabad then began relaying the boundaries of Turk Ballia under the Survey Act, on the basis of the maps of the Revenue Survey and the Diara Survey.

The defendant Maharaja, who was in possession of the lands in suit, objected to the demarcation, and claimed the land as an accretion to his own estate. He refused to give up possession, with the result that this suit was instituted, as already stated, on the 8th December, 1916, by the Secretary of State for India in Council.

The Maharaja's estates in the locality lie mainly on the south side of the river. As the new land formed on the southern side of the river, the Maharaja had treated it as a portion of his property.

As the learned Judge, who tried the suit, pointed out, if this land was an accretion to the property of the Maharaja, it would ordinarily have been liable to assessment of land revenue under Act 9 of 1847. But the Maharaja claimed special privileges in respect of alluvial accretions.

The bulk of the estates which form the Maharaja's zamindari were permanently settled at the decennial settlement of 1789-90, which was confirmed by Regulation 1 of 1793. This included the estate of "Dhakaich Mahal," and in connexion with this estate there was a condition agreed to that the Maharaja's predecessor should not claim abatement of revenue for losses by diluvion and he should not be liable to additional assessment on account of alluvial accretions.

To the north of the Dhakaich Mahal, between this estate and the Ganges, were certain villages, not included in settlement of 1790, which were either waste or uncultivable, or partly or wholly submerged. These villages were settled

with the Maharaja in 1800, and form part of the "Jauhi Mahal," and include the villages of Jagdishpur and Parsanpa.

It was as alluvial accretions to these two villages that the Maharaja entered into possession of the lands in suit, at parts of it became fit for cultivation.

It was argued on behalf of the appellant before their Lordships that if the appellant acquired a good title to the lands in suit by reason of their gradual accession to his other lands, it would be necessary for the authorities to assess the accreted land under Act 9 of 1847 before revenue could be levied in respect thereof, that as this was not done, the Maharaja could not be said to be in default of payment of revenue, and that consequently the sale was without jurisdiction and was invalid.

The learned counsel argued, therefore, that he need not rely on the settlements of 1790 and 1800, inasmuch as his case was that the Maharaja was the proprietor of the accreted land, and that he had not been assessed in respect thereof.

Their Lordships agree with this part of the learned counsel's argument, and are of opinion that if it could be shown that the Maharaja had become the proprietor of the lands in suit by reason of their gradual accession to his other lands, a fresh assessment of such accreted lands under Act 9 of 1847 would be necessary before the Maharaja could be called upon to pay revenue in respect of such accreted lands.

The learned Judges of the High Court seem to have thought that the appeal mainly depended upon the construction of terms of the settlements of 1790 and 1800. Their Lordships are unable to accept that view for the reasons already stated.

The learned Judges of the High Court came to a further conclusion, as follows:

Having already determined that the settlement of 1800 does not include the lands now in suit, and assuming that the lands never reverted to the Crown by abandonment, it becomes unnecessary to consider whether the appellant has acquired any proprietary interest in the lands or not.

Their Lordships are not able to agree with this conclusion.

The main point argued before their Lordships on behalf of the appellant was that the Maharaja had obtained a good title to the lands in suit by reason of their gradual accession to his estate to

the south of the Ganges by reason of the recess of the river to the northward, and their Lordships agree that this is the principal question in the case.

It raises an important issue which goes to the root of the case, and, in their Lordship's opinion, a decision in respect thereof is essential to the disposal of the appeal.

The argument of the learned counsel on behalf of the appellant in respect of the last-mentioned submission, viz., that the Maharaja had obtained a good title to the lands in suit by reason of their gradual accession to his estate on the south side of the river—was based upon the provisions of Regulation 11 of 1825, S. 4, Cl. (1). The clause is as follows :

IV.—First. When land may be gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from Government by a zemindar or other superior landholder, or as a subordinate tenure, by any description of under-tenant whatever. Provided that the increment of land thus obtained shall not entitle the person in possession of the estate or tenure to which the land may be annexed, to a right of property or permanent interest therein beyond that possessed by him in the estate or tenure to which the land may be annexed, and shall not in any case be understood to exempt the holder of it from the payment to Government of any assessment for the public revenue to which it may be liable under the provisions of Regulation 11, 1819, or of any other Regulation in force. Nor if annexed to a subordinate tenure held under a superior landholder, shall the under-tenant, whether a khodkasht ryot, holding a mouroosee istimtree tenure at a fixed rate of rent per begah, or any other description of under-tenant liable by his engagements, or established usage, to an increase of rent for the land annexed to his tenure by alluvion, be considered exempt from the payment of any increase of rent to which he may be justly liable.

It was urged on behalf of the appellant that the above-mentioned clause was applicable to the facts of this case.

Before considering this question it is necessary to mention certain findings of fact of the learned District Judge who tried the suit :

1. The learned Judge found that the Mahal Turk Ballia, which originally lay on the north side of the river, was washed away to a depth of 80 or 100 yards in a year ; that the erosion was slow and gradual in a limited sense, in that it operated by degrees upon the face of the bank ; that it could not be called imperceptible.

2. The learned Judge found that the process of alluvion by which the land in suit was formed on the south side of the river was slow, gradual and imperceptible.

3. He held that it was hardly open to question that the land in suit stands on the site formerly occupied by the Mouzah Turk Ballia ; that is to say, though Turk Ballia formerly lay on the north of the Ganges and the land in suit lies on the south of the river, this land lies in the same geographical position, in the same latitude and longitude as that which was originally occupied by Turk Ballia.

These findings were adopted by the learned Judges of the High Court, and in the argument before their Lordships they were not contested.

It was argued on behalf of the plaintiff (respondent) that, inasmuch as the lands in suit had been identified as the Mahal Turk Ballia and inasmuch as this was a case of "re-formation in situ," the first clause of S. 4 of Regulation 11 of 1825 did not apply, but that the fifth clause was applicable and that by general principles of equity and justice it should not be held that the Maharaja was the proprietor of the lands in suit.

The terms of the first clause of S. 4, taken literally and by themselves, may be said to be sufficiently wide and general to include the facts of this case, but the clause has been the subject of judicial decisions, some of them by the Judicial Committee, which appear to their Lordships to place a limitation upon the application of the first clause.

A large number of cases were referred to during the course of the argument, and these have been fully considered ; their Lordships, however, do not think it necessary to refer to all the cases, and they are of opinion that it will be sufficient to mention the following :

In *Lopez v. Maddan Mohan Thakore* (1) it appeared that land forming part of a mouzah on the banks of the Ganges, by reason of continual encroachments of that river became submerged, the surface soil being wholly washed away. After recession and re-encroachment by the river, the water ultimately subsided and left the land re-formed on its original site. It was held by the Judicial Committee, applying the principal of English law and following *M. Iman Bandi v. Hur Gobind Ghose* (2) that the land washed away and afterwards re-formed on the old ascertained site was not land gained by increment within the meaning

(1) [1869] 13 M. I. A. 467=14 W. R. 11=5 B. L. R. 521 (P.C.).

(2) [1847] 4 M. I. A. 403=7 W. R. 67=1 Suther. 208. 1 Sar. 371 (P. C.).

of S. 4 of the Bengal Regulation 11 of 1825. Their Lordships' judgment in that case in the first place stated the rule of English Law, and it was noted that it is not a principle peculiar to any system of municipal law, but that it is a principle founded in universal law and justice. It was then mentioned that the principle of law so far as relates to accretions had to some extent been made part of the positive written law of India.

Their Lordships then referred to Regulation 11 of 1825, S. 4, Cl. (1), and proceeded as follows :

It is to be observed, however, that the clause refers simply to cases of gain, of acquisition by means of gradual accession. There are no words which imply the confiscation or destruction of any private person's property whatever. If a regulation is to be construed as taking away anybody's property, that intention to take away ought to be expressed in very plain words, or be made out by very plain and necessary implication.

It would certainly seem that something more than mere reference to the acquisition of land by increment, by alluvion, or by what other term may be used, would be required in order to enable the owner of one property to take property which had been legally vested in another. In truth, when the whole words are looked at, not merely of that clause but of the regulation, it is quite obvious that what the then legislative authority was dealing with was the gain which an individual proprietor might make in this way from that which was part of the public territory, the public domain not usable in the ordinary sense—that is to say, the sea belonging to the State, a public river belonging to the State; this was a gift to an individual whose estate lay upon the river or lay upon the sea, a gift to him of that which by accretion became valuable and usable out of that which was in a state of nature neither valuable nor usable.

That decision was given in the year 1870, but the principle had been stated in 1862 by Sir B. Peacock in *Ramanath Thakore v. Chandernarain Chowdhury* (3).

The head-note in the last-mentioned case is as follows :

Lands washed away and afterwards re-formed upon the old site, which can be clearly recognized, are not lands 'gained' within the meaning of S. 4, Regulation 11, of 1825; they do not become the property of the adjoining owner, but remain the property of the original owner."

Sir Barnes Peacock, in giving judgment, is reported to have said :

We are of opinion that the word 'gained' in S. 4 of Regulation 11 of 1825 does not extend to cases of land washed away and afterwards re-formed upon the old site, which can be clearly recognized . . . In such a case we think the land formed by accretion on the old recog-

(3) 1 Marshall's Rep. 136.

nized site remains the property of the owner of the original site. . . .

The principle is that where the accretion can be clearly recognized as having been re-formed on that which formerly belonged to a known proprietor, it shall remain the property of the original owner.

The decision in *Ramanath v. Chandernarain Chowdhury* (3) was approved by their Lordships of the Judicial Committee in *Lopez v. Maddan Mohun Thakore* (1).

It was conceded by learned counsel for the appellant that the decision in *Lopez v. Maddan Mohun Thakore* (1) was correct, having regard to the facts of that case; and it was not denied that if, in the present case, after the Mahal Turk Ballia had been wholly submerged, the river had receded to the south and the land had re-formed on the ascertained original site of Turk Ballia, and if such site lay to the north of the river, the land so re-formed would belong to the original proprietors.

It was argued, however, that this principle did not apply when the question arose between two riparian owners, who owned property on either side of the river, and when the land was washed away from one side of the river and re-formed on the other side, even though it was re-formed on the old ascertained site.

Their Lordships are unable to see why the principle should apply in the one case and should not apply in the other.

There is no doubt in this case that the land re-formed on the old ascertained site of Turk Ballia. If the river had receded to the south, and had left the land re-formed on the site of Turk Ballia on the north side of the river, it would undoubtedly have belonged to the original proprietors; but as the river receded towards the north and left the land re-formed on the old ascertained site of Turk Ballia on the south side of the river, it was argued that the proprietors had lost their property, and that it belonged to the appellant Maharaja by reason of gradual accession.

Their Lordships are not prepared to accept that argument, and are of opinion that the principle laid down in the two above-mentioned cases applied to the facts of the present case.

Their Lordships are confirmed in this opinion by several later decisions to which it is desirable to draw attention.

In *Nogendra Chunder Ghose v. Mohamed Esuf* (4) their Lordships of the Privy Council in 1872 again had to consider Regulation 11 of 1825. They discussed the different sections of the Regulation, and stated that :

Two observations arise on this Statute :

(1) There is nothing to show that the first rule contemplates land other than that which commonly falls within the definition of 'alluvion,' viz., land gained by gradual and imperceptible accretion, the *incrementum latens* of the civil law.

(2) No express provision is made for the case of land which has been lost to the original proprietor by the encroachment of the sea or a river, and which after diluviation, re-appears on the recession of the sea or river. But, on the other hand, there is nothing to take away or destroy the right of the original proprietor in such a case ; which must, therefore, be determined by 'the general principles of equity or justice' under the fifth rule. That the right of the proprietor in the case last put exists and is recognized by law in India, is established by at least two cases decided at this Board.

It was further stated by their Lordships that :

It is not easy to see upon what principle a title to alluvion by gradual accretion should prevail against the original ownership established by identification of site ; unless it be that where the accretion is so gradual as to be latent and imperceptible during its progress, the law on grounds of convenience, presumes incontrovertibly that no other ownership can be shown to exist and so bars enquiry.

The case of *Hursuhai Singh v. Syed Lutf Ali Khan* (5) is on the same lines, and was decided in 1874.

It is important both on account of the facts of the case and on account of the decision thereon. The suit was brought by the appellants, the proprietors of the Mouzah Muteor, in Tirhoot, against the respondents, the proprietors of Mouzah Ramnuggur, to recover the possession of a large quantity of land which had been submerged by the river Ganges. It appears that the river flowed between the estates of the plaintiffs and the defendants, and in its course between the two estates there were two or three defined channels, which at times the river overflowed and formed a pool or lake.

The land which was the subject of the suit was submerged, and when it first became free from water and re-appeared, in the view which their Lordships took of the facts, it adhered to and adjoined the estate of Ramnuggur, and "prima

facio the accretion was to that estate." But upon enquiry made by the Judge of Patna, who went to the spot, heard evidence and took great pains to survey the district, he came to the conclusion that 'the submerged land, although it had re-formed close to Mouzah Ramnuggur, was, in point of fact, land which belonged to Mouzah Muteor, and that there were means by which he could identify, and did identify, the land as having been before its diluviation part of that mouzah.

Two points should be noted about this case : (1) The river ran between the estates of the plaintiffs and the defendants ; (2) when the land became free from water and re-appeared, it adhered to and adjoined the estate of Ramnuggur (i. e., the defendants' estate), and, to use the words of their Lordships, "prima facio the accretion was to that estate."

Their Lordships, however, held, on the authority of *Lopez v. Madan Mohun Thakore* (1) that where land which has been submerged re-forms and can be identified as having formed part of a particular estate, the owner of that estate is entitled to it.

Their Lordships accordingly allowed the appeal and restored the decree originally made by the Judge of Patna, which was to the effect that the plaintiffs (appellants) were entitled to the lands.

In *Rani Sarat Sundari Debya v. Soorjaya Kant Acharjya* (6) the head-note is as follows :

Where land re-forms by alluvion on a site capable of identification, the right of the owner of the original site to the chur is indisputable.

This case, which is another decision of the Judicial Committee, is material because the plaintiff sought to establish his title on the ground that the land had in consequence of the recession of the river Jamoona and by gradual accretion, become part of the village of Juggatpoora which formed part of his zemindari.

The plaintiff failed in his suit because it was found that the land claimed by him was a re-formation upon land which belonged to the defendants, and it was pointed out that even if the defendants had been plaintiffs and could make out that the land claimed was a re-formation upon land which had belonged to them, they would be entitled to recover it from a party in possession.

(4) 10 B. L. R. 406=18 W. R. 113=3 Sar. 151 (P. C.).

(5) [1874] 2 I. A. 28=23 W. R. 8=14 B. L. R. 268=3 Suther. 56=3 Sar. 411 (P. C.).

(1) [1876] 25 W. R. 242.

In *Radha Proshad Singh v. Ram Coomar Singh* (7) the doctrine in *Lopez's* case (1) was accepted, but it was held that it did not apply to land in which after their re-formation an indefeasible title had been acquired by long adverse possession or otherwise. The judgment is important, because at page 800 their Lordships are reported to have said :

The doctrine in *Lopez's* case was doubtless in favour of the defendants in both suits ; and if they had in no way lost their rights, would give them a title to the land re-formed upon sites identified by the thnkust proceedings of 1864 as within the boundaries of their original mouzahs, which would prima facie override a title founded on the principle of the acquisition of that land by the proprietor of the northern bank of the Ganges by means of gradual accretion. Their Lordships conceive, however, that the doctrine in *Lopez's* case cannot be taken to apply to land in which by long adverse possession or otherwise another party has acquired an indefeasible title.

In *Sardar Jaggot Singh v. Rani Brijnath Kunwar* (8) it was held by their Lordships of the Judicial Committee that land submerged by the wanderings of a river from its course and afterwards re-emerging in a form capable of being identified, does not cease to belong to its original owner. The adjoining proprietor cannot make title to it either under sub-S. 1 or sub-S. 5 of Regulation 11 of 1825, S. 4, or on any known principle.

Lord Robertson, in giving judgment said :

It is perfectly plain that neither the specific provision of the first subsection nor the general principles of equity and justice lend the slightest support to the pretension of the appellant, which is to land that would be gained not from the river but from a neighbour.

Their Lordships are of opinion, in view of the principles adopted in the above-mentioned decisions, and in view of the above-mentioned findings of fact, especially the finding that the lands in suit, which appeared on the south side of the river, occupied the site whereon Turk Ballia stood before it was submerged, that the lands did not become part of the Maharaja's estate, and that the Maharaja did not obtain title thereto under the provisions of S. 4, Cl. (1), of Regulation 11 of 1825, but that the title to the land remained in the original proprietors of Turk Ballia. Subject to the question of custom, which is dealt with hereafter, they are further of opinion that it would not be in accordance with

general principles of equity and justice to hold that the lands belonged to the Maharaja.

Their Lordships therefore, are of opinion that the learned District Judge's conclusion on this part of the case was correct.

Much reliance was placed by the learned counsel appearing on behalf of the appellant upon the case of *Rughoo-bur Dyal Sahoo v. Maharaja Kishen Pertab Sahee* (9).

Their Lordships are of opinion that the question, which, is directly in issue in the present case, was not raised in the above-cited case.

In the cited case the two principles, upon which the determination of the Board of Revenue was based, were the existence of an alleged usage, and the inference that by reason of that usage the antecedent interest of the plaintiffs and their predecessors in the land was only of a limited, temporary, and conditional character. Their Lordships of the Judicial Committee held that the trial of the cause had been unfortunate inasmuch as it failed to determine the substantial questions (see page 216) : hence the remand and the further trial which was directed.

When the case came before the Judicial Committee the second time on appeal from the High Court, it appeared that the High Court had based their decision on a finding that the settlements made with the plaintiffs were temporary settlements, and were made on the basis that the river Gundnek was the boundary line not only of the two Zillahs Sarun and Tirhoot, but of the estates appertaining to these districts : that the land in dispute was settled with the plaintiffs on temporary leases, and that those settlements were of a limited and temporary character, and that, such being the case, the finding was fatal to the plaintiffs' suit. It was assumed that the accretion belonged to the plaintiffs by virtue of the first clause of S. 4 of Regulation 11 of 1825, and it hardly could have been otherwise because the contention of the defendants was that the title of the land depended upon the course of the river. Their Lordships then proceeded to direct their attention to the question whether the settlements

(7) [1877] 3 Cal. 796=1 C. L. R. 259 (P. C.).

(8) [1900] 27 Cal. 768=27 I. A. 81=4 C. W. N. 555 (P. C.).

(9) [1878] 6 I. A. 211=5 C. L. R. 418=4 Sar. 64 (P. C.).

with the plaintiffs were of a temporary character. Their Lordships held that the interest of the plaintiffs were not temporary but permanent, though the assessments were merely temporary, and that the real question was whether there was a clear and established usage that the river should be the constant boundary between the zemindaries on either side.

Their conclusion was that the plaintiffs were during twenty years in occupation of the land when at the expiration of the settlement of 1847, in consequence of a sudden turn of the river Gunduck it was on the southern side of the river, capable of being identified; that it still belonged to the plaintiffs unless there was a clear and definite usage that the river Gunduck was the boundary not only between the two districts but also between the zemindaries on either side. It was held that such a custom or usage was not found ever to have existed. Their Lordships accordingly reversed the decree of the High Court and declared that the plaintiffs were entitled to the land in dispute. It is not clear that the defendants were relying on the 1790 settlement as giving them any present right, but rather as an historical event, for the purpose of showing that they were right in their contention that the boundary between the two estates was the main channel of the river Gunduck. In fact, it appears that in order to get rid of the plaintiffs' contention that they had a good title by reason of the settlements of 1837 and 1847, the defendants argued that the proprietary right in the soil might have all along remained in the Government, and that the settlements with the plaintiffs were merely temporary. Their Lordships do not find in the last-cited case anything conflicting with the principles upon which the afore-mentioned decisions of the Judicial Committee were based.

It was next argued on behalf of the Maharaja that he had title to the lands in suit by reason of an alleged immemorial custom in the locality in question, by which land adhering by gradual alluvion to a riparian village becomes a part of the estate to which it accretes.

As the learned District Judge pointed out, the evidence called for the defendant was directed to show that there was a custom by which accretions to the

Shahabad side vested in the Shahabad zemindar, viz., the Maharaja.

The first thing to be noted is that the custom which the Maharaja by his witnesses attempted to prove was not the custom pleaded.

The pleading alleged that according to immemorial custom and usage prevailing in the locality, the deep stream of the Ganges is the boundary of the riparian estates and consequently all accretions to an estate by that local custom, as well as by the law governing accretions become a part and parcel of the estate to which accretions have formed.

It would be sufficient for their Lordships to leave the matter there, but as their Lordships have come to a clear conclusion on the merits of this question, they consider that it is desirable to state it.

The learned District Judge found that no custom as alleged had been proved to exist. The learned Judge of the High Court on appeal stated that they would be prepared to accept the findings of fact arrived at by the learned Judge, but having already determined that the settlement of 1800 did not include the lands in suit, and assuming that the lands never reverted to the Crown, it became unnecessary to consider whether the appellant acquired any proprietary interest in the lands or not.

It might be argued that this was a concurrent finding of fact, but however that may be, their Lordships are of opinion that the learned District Judge's finding in this respect was correct, and that the custom alleged was not proved.

It should be noted that up to a comparatively recent time the Maharaja had been upholding the opposite contention, viz., that there was no such custom as that which was alleged by him in this case.

It should be stated that having regard to the facts stated in the earlier part of the judgment, in their Lordships' opinion there is no ground for holding that the proprietors of the Turk Ballia estate abandoned their estate and interest therein.

There remains another point with which their Lordships think it necessary to deal. It was argued on behalf of the appellant Maharaja that even assuming he failed to obtain a title to the lands in suit, either under the Regulation XI

of 1825, S. 4, or by reason of the alleged custom, the sale of the lands in suit was invalid, and the plaintiff obtained no title thereby; consequently, it was argued that as the defendant was admittedly in possession of the lands, and if, as the defendant alleged, the plaintiff obtained no title by the sale, the suit should have been dismissed.

In view of their Lordships' decision on the above-mentioned points, the defendant, though in possession of the lands, was merely a trespasser. The question remains whether the sale was good and valid as against the original proprietors of Turk Ballia, so as to give the plaintiff a title on which he could base his suit for possession of the lands. There is no doubt that there was revenue due at the date of the sale, that such revenue was not paid, although, as stated in the appellant's case, notices had been given to the original proprietors to pay the revenue alleged to be due; and their Lordships are satisfied that the Collector had jurisdiction to sell, and that the allegations as to irregularities in the sale were not substantiated.

Further, no suit was instituted within a year of the sale, and the provisions of S. 33 of Act XI of 1859, might have to be considered.

For these reasons their Lordships are of opinion that the sale was not invalid, and that the plaintiff did obtain a good title as the purchaser at the sale—and that he was competent to obtain a decree for possession against the defendant, who had no title to the lands.

Though not agreeing, as already stated, with some of the grounds of the High Court's judgment, their Lordships are of opinion that the decree of the learned District Judge was correct, and that the Maharaja's appeal to the High Court was rightly dismissed.

They will, therefore, humbly advise His Majesty that this appeal should be dismissed, and that the appellant should pay the costs of the appeal.

D.D. *Appeal dismissed.*

Solicitors for Appellant—*Watkins and Hunter.*

Solicitors for Respondent—*The Solicitor, India Office.*

* A. I. R. 1927 Privy Council 97

(FROM CALCUTTA)

24th February 1927

VISCOUNT DUNEDIN, LORD SALVESEN
AND SIR JOHN WALLIS

Keshoram Poddar—Appellant.

v.

Nundo Lal Mallick—Respondent.

Privy Council Appeal No. 91 of 1925 :
Calcutta Appeal No. 2 of 1925.

Calcutta Rent Act (3 of 1920), S. 18—Case started before amendment of the Act in 1924 is governed by old Act.

The appellant was let into possession on the 1st June 1920, as a tenant, but the rent payable was not then fixed. He remained in possession until March 1923. The question of rent having been mooted in the meantime, the respondent-landlord demanded from the appellant rent at the rate of Rs. 4,500 per mensem, inclusive of taxes. The appellant conceiving that this demand was excessive, decided to avail himself of the provisions of the Calcutta Rent Act (Bengal) No. 3 of 1920, which had come into force on the 5th May 1920. The appellant accordingly applied to the Controller. On the 23rd October 1922, the Controller fixed the rent at Rs. 4,500 per month; on the 25th November 1922, the appellant appealed to the President of the Improvement Committee to review that decision. The President, whose time was fully occupied by appeals, did not take up the appellant's appeal at once, but from time to time adjourned the hearing, so that it was only finally disposed of on the 3rd August 1924. He disposed of it by holding that he had no jurisdiction to determine the matter, by which time the Act had ceased to apply to premises of higher rent by virtue of the proviso to Calcutta Rent Amendment Act (Bengal) No. 1 of 1924.

Held: that the President had jurisdiction as the application of an Act is when the parties begin to move. [P. 97, C. 2, P. 98, C. 1]

* (b) *Interpretation of statutes—Applicability of Act.*

The application of Act is when the parties begin to move under it. [P. 98, C. 2]

L. Degruyther and B. Dube—for Appellant.

Viscount Dunedin.—The appellant in this case is the tenant, and the respondent is the landlord of certain premises in Calcutta.

The appellant was let into possession on the 1st June 1920, as a tenant, but the rent payable was not been fixed. He remained in possession until March, 1923, and the question raised by the case is, what rent ought to be paid or that period of occupation.

After the entry in June 1920, the question of rent being mooted, the respondent

demanded from the appellant rent at the rate of Rs. 4,500 per mensem, inclusive of taxes. The appellant conceiving that the demand was excessive, decided to avail himself of the provisions of the Calcutta Rent Act (Bengal) No. 3 of 1920, which had come into force on the 5th May 1920. By that Act, either the landlord or the tenant may apply to the Controller of Rates, an officer appointed under the Act, to fix the standard rent. By S. 18 of the Act an appeal is given from his decision to the President of the Improvement Tribunal, whose decision is declared to be final. The appellant accordingly applied to the Controller. On the 23rd October, 1922, the Controller fixed the rent at Rs. 4,500 per month; on the 25th November 1922, the appellant appealed to the President of the Improvement Committee to review that decision. The President, whose time was fully occupied by appeals, did not take up the appellant's appeal at once, but from time to time adjourned the hearing, so that it was only finally disposed of on the 3rd August 1924. He disposed of it by holding that he had no jurisdiction to determine the matter. This he did because of two Acts which had been passed while the case was waiting for hearing before him.

In the original Act, S. 1, sub-S. 4, it was provided that the Act should commence when the Local Government should by notification direct and should continue for three years from that date. By the Calcutta Rent Amendment Act (Bengal) No. 2 of 1923, that provision was amended by the substitution of the fixed date of the end of March 1924, for the expiration of three years from the commencement. A further amendment was made by the Calcutta Rent Amendment Act (Bengal) No. 1 of 1924, by which the date 1927 was substituted for 1924, but there was added the following proviso:

Provided that after the 31st day of March 1924, this Act shall cease to apply to any premises the rent of which exceeded Rs. 250 a month, or Rs. 3,000 a year, on the 1st day of November 1918.

The appellant then applied to the High Court under S. 115 (b) of the Code of Civil Procedure to have a judgment enjoining the President to exercise his jurisdiction, but the Judges of the High Court took the same view as the President, holding that he had no jurisdiction.

There is no question but that the premises in question in the case are worth more than the figure mentioned in the proviso to the Act of 1924. The President of the Improvement Tribunal, in his judgment, said:

The plain meaning of the amendments effected by the Act of 1924 is that the principal Act is extended till the end of March, 1927, in the case of all premises except those the rent of which on the 1st November 1918, was over Rs. 250 a month; and consequently, so far as the last-mentioned premises are concerned, the principal Act expired with the 31st March 1924.

The rent of the premises in question in all these cases were more than Rs. 250 a month on the 1st November 1918. It follows from what I have said that the proceedings in all these three cases terminated ipso facto on the 31st March, 1924.

The learned Judges of the High Court took the same view. Their Lordships think that the discussions as to the different effects of a repealing Act on the one hand, and an expiring Act on the other, which bulk largely in the judgments given, are really beside the point. The Act is the Act of 1920. It was a temporary Act and would have expired in three years from its inception, but by subsequent amendments its life was prolonged until 31st March 1924. It was, therefore, a living Act at the moment of the application to the President. Then there is the proviso. The view taken by the learned Judges is that the effect of the proviso is to make the Act a temporary Act ending at March 1924, as regards the higher valued premises, but an existing Act until 1927 as to other premises. Their Lordships think that this is an erroneous view. As above said, the Act of 1920 still lives until 1927. The effect of the proviso is just as if the words therein had been inserted in the original Act, and the Act must be so read at the present time. Now, if that had been done it would, their Lordships think, never have occurred to anyone to say that there could be aught but one interpretation. The Act is good for premises of all values up to March, 1924, but only good for those of lower value after that.

The application of the Act is when the parties begin to move under it. This was done in the present case before March 1924.

The rest is merely the working out of the application. Their Lordships are of opinion that the High Court ought to have directed the President of the Im-

provement Tribunal to exercise his jurisdiction. The case must go back for them to do so. When he exercises it, his judgment, in view of S. 18, will be final and not subject to review.

Their Lordships will humbly advise His Majesty in accordance with the above opinion, and the appellant will have the costs of this appeal and in the Court below.

D.D.

Appeal allowed.

Solicitors for Appellant—*Watkins & Hunter.*

* * A. I. R. 1927 Privy Council 99

(FROM RANGOON)

22nd February 1927

LORDS PHILLIMORE, CARSON, AND
DARLING AND MR. AMEER ALI

Ma Hnit—Appellant.

v.

Fatima Bibi and another—Respondents.

Privy Council Appeal No. 83 of 1925.

* * *Limitation Act, Art. 97—Mortgage properly sold in execution of mortgage decree and purchased ultimately by mortgagee—Mortgagee dispossessed by decree of competent Court in suit by a person claiming the property alleging the mortgage not binding upon him—Suit for return of consideration—Time runs from date of decree dispossessing him—Transfer of Property Act, S. 68.*

In a suit on mortgage, mortgagor admitted the loan and decree was passed. The property was sold in execution and was ultimately purchased by mortgagee. A suit was then filed by a person claiming the property and alleging that the mortgage was not binding on him. His suit was decreed and the mortgagee was dispossessed. The mortgagee then sued for the amount of consideration.

Held: that cause of action arose on the day the suit challenging the mortgage was decreed and the mortgagee was dispossessed. [P 100 C 2]

E. B. Raikes—for Appellant.

W. Wallach—for Respondents.

Lord Darling.—This appeal is from a decree of the High Court dated the 12th May 1924, dismissing an appeal from a decree of the District Court of Magwe, dated the 22nd May 1922.

The chief question in the appeal is whether the suit in which it is made was rightly dismissed as barred by the Limitation Act.

The appellant and her husband, U Po Ya, on the 6th August, 1907, advanced Rs. 10,000 to the first respondent, Fatima Bibi, then alleging herself to be the guardian of one Ali Hashim Mehter, her nephew, then a minor.

The first respondent is a Mahomedan purdahnashin woman, and borrowed this money through her agent and husband, Hamid Ibrahim Madari, and he at the same time executed on her behalf and was her constituted attorney as guardian of the minor, a mortgage of two oil wells, professedly belonging to the minor, in favour of the appellant and her husband to secure repayment of the money advanced with interest at the rate of $1\frac{1}{4}$ per cent. per mensem.

That the minor had no real interest in any of the properties dealt with is demonstrated in the words of para. 5 in the sale deed (dated 18th January 1912), by Fatima Bibi, her husband, and Mehter, the minor, which are as follows:

Although Ali Hashim Mehter's name is included in the sale deed by which Hamid Ibrahim Madari and wife Fatima Bibi buy the oil and the No. 1416 from Ma Ngwe, he has no monetary relation or claim in the affairs and he does not enjoy any possession of the well too. We have bought it with our own money and enjoyed it. We have only mentioned the minor Ali Hashim Mehter's name in it, a way of 'trying luck.' We guarantee the said well to be free from all encumbrances. In case of any incumbrance, we, the vendors, agree to make good any expense incurred by the vendees and also profits from the well which they may enjoy otherwise.

On the 5th February 1913, the appellant and her husband sued the minor (by the first respondent as his guardian) and the first respondent and her husband in the District Court of Magwe for the principal and interest due on the mortgage and the first respondent and her husband put in a written admission of the claim. The District Court on the 8th July 1913, passed a decree in that suit as claimed. In execution of that decree the oil wells were sold by auction and purchased by one, Ma Tok, who afterwards resold them to the appellant and her husband, who thus got possession of them.

In or about April 1915, the minor Ali Hashim Mehter, by his father, as next friend, sued the appellant and her husband, Ma Tok, and the first respondent, and her husband in the same District Court to set aside the sale of the oil wells and for a declaration that the mortgage of the 6th August 1917, was not binding

on him. His suit failed in the District Court; but the appellate Court gave him on the 11th March 1918, the decree that he claimed, on the ground that the first respondent was not legally his guardian and had no authority to mortgage his oil wells or to represent him in the suit on the mortgage. The appellant had thereupon to give up possession of the oil wells.

The appellant's husband having died she, on the 9th August 1919, brought the suit under appeal against the first respondent in her personal capacity and as one of the heirs of Hamid Ebrahim Madari (who had also died), and against the second respondent (his son as his heir) by a plaint, in which, after setting out the facts already mentioned, she relied on the admission of the first respondent and her husband that they had received the money borrowed, and she submitted that as it could not be recovered from the minor they should repay it with interest. She further stated that the cause of action arose on the 11th March 1918, when the appellate Court set aside the sale.

The respondents put in written statements and the Court raised issues of which the following are material to this appeal:

1. Is the plaintiff's suit time barred?
2. Are the defendants liable for the amount claimed?

The appellant gave evidence in support of her claim and asked for a postponement to produce further evidence which the District Judge refused. The respondent gave no evidence.

The District Judge dismissed the suit as barred by limitation, as being a suit on the personal covenant in a registered instrument.

The High Court in appeal took the same view: overruling the contention of the appellant that her cause of action in the suit only arose on the 11th March 1918, on the ground that the frame of the plaint and the claim for interest showed that she had sued on the covenant in the mortgage.

From that decree, dated the 12th May 1924, the appellant has appealed to His Majesty in Council.

Although many points were raised on the pleadings, several were abandoned in the course of the litigation; and in the course of the arguments of this appeal it

has appeared to their Lordships that of the points taken on behalf of the appellant one is in itself conclusive. In fact the case is reduced to the simple question whether the appeal is so late as to be barred by the Indian Limitation Act 1908 (9 of 1908). For the appellant it was argued by Mr. Raikes that the suit in which the decree under appeal was made was not founded on the mortgage of 6th August 1907, but is for the repayment of money due to her, and that her claim to this sum arose when the mortgage and sale thereunder were set aside, that is to say, on 11th March 1918; and reliance was placed on the Indian Limitation Act, 1908, First Schedule, Part 6, Article 97. The effect of that provision is that the suit is not barred if brought "for money paid upon an existing consideration which afterwards fails;" provided that suit is begun within three years from the date of the failure of the consideration.

This present suit was commenced on 9th August 1919. For the respondents it was contended that there never was any consideration for the loan of the sum of Rs. 10,000 then advanced by plaintiff and her husband—as the respondents then had no interest or property in the subject of the mortgage. Thus it was contended there was a complete absence or failure of consideration at and from the very moment when the money was advanced, i. e., more than twelve years before this suit was begun. Were this contention well founded this present claim would undoubtedly be statute barred. But should the true date of the failure of the consideration for the loan of the money be the day on which the appellate Court made a decree in favour of Ali Hashim Mehter (the minor) setting aside the mortgage, and giving him possession of the mortgaged property, i. e., 11th March 1918, then this suit would be well within the three years allowed for taking proceedings to recover the Rs. 10,000, with interest, for the loan of them. In the opinion of their Lordships this contention of the appellant is well founded. It was proved that respondent and her husband did for some time pay to the appellant and her husband the interest agreed by them to be payable on the money lent. Default in this respect having been made, appellant and her husband, on 5th February 1913, took proceedings,

claiming the principal and interest as due from the respondents, who made written admission of the debt. On 8th July 1913 a decree in favour of appellant was made, and by virtue of it the property was sold by auction in order to pay the money then due to appellant and her husband. As already stated, this decree was set aside at the instance, and in favour of Ali Hashim Mehter (the minor), and on 11th March 1918 the sale was finally set aside by the appellate Court, and the property, on the security of which appellant and her husband had advanced Rs. 10,000, was handed over to Ali Hashim Mehter.

From these facts it appears that the appellant and her husband were, from the date of the loan (6th August 1907) down to 11th March 1918 not entitled to allege that they had not received any consideration for the loan that they had made—since for a considerable time they had actually received interest upon it, paid to them by the respondents. In 1913 they had obtained, in a suit against the respondents, a decree under which the property was sold in order that the appellant's loan might be repaid. The fact that they afterwards became possessed of the same property, by buying it from the purchaser at the auction, has no immediate bearing on the matter in dispute. They purchased from one who had bought the property at a sale decreed by a competent Court, and the price paid by him had been applied to repay a portion of the money advanced by the appellant to the respondents on security of the property mortgaged. It, therefore, appears to their Lordships that there was at the time of the loan no failure of the consideration upon which the loan of the money and the promise to repay it with interest was made since the obligation of that promise was for some time observed and it appears to them that the failure of consideration for the loan of the money did not occur until 11th March 1918. Consequently the suit is not barred by statute.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, and that judgment should be entered for the plaintiff for the principal sum, Rs. 10,000, with interest at such rate and for such period and subject to such allowance, if any, for mesne profits during the period during

which the plaintiff and her husband were in possession of the land as the Courts in India may determine, and that for this purpose the suit be remitted to the High Court at Rangoon. Their Lordships will also humbly recommend that the plaintiff do have her costs of the suit here and below.

D.D.

Appeal allowed.

Solicitors for Appellant — *Bramall & Bramall.*

Solicitors for Respondents — *Waterhouse & Co.*

* * A. I. R. 1927 Privy Council 101

(From Allahabad)

10th February 1927

LORDS SHAW, PHILLIMORE & DARLING,
MR. AMEER ALI AND SIR LANCELOT
SANDERSON.

Saheb Rai and others—Appellants.

v.

Shafiq Ahmad and others—Respondents.

Privy Council Appeal No. 162 of 1924 :
Allahabad Appeal No. 5 of 1923.

* * *Hindu law—Partition—Stepmother given a share for maintenance with responsibility of share of husband's debts—Share should be deemed as absolute estate.*

Prima facie, when an arrangement is come to by which the stepmother is to receive a sum for maintenance the presumption would be that in no case could an absolute interest be intended to be conferred. But a presumption of this kind must yield to other circumstance that the lady was being made responsible for a definite share of the debts which had been incurred by her late husband; when such a transaction has stood for a very long period of time, it would not be disturbed. [P. 101, C. 2, P. 102, C. 1]

G. R. Lowndes and E. B. Raikes—for Appellants.

A. M. Dunne and B. Dube—for Respondents.

Lord Shaw.—Various questions have been raised in this appeal, and having fully heard the argument for the appellants on one point, to be alluded to, their Lordships do not think it necessary to call on counsel for the respondents.

The law appears to their Lordships to be correctly laid down by the High Court in the following sentences :

Prima facie, when an arrangement of this nature is come to by which the stepmother is to receive a sum for maintenance the presumption

would be that in no case could an absolute interest be intended to be conferred.

But the Court goes on to say :

But in the present case a presumption of this kind must yield to the other evidence which we have before us. We do not see how any theory that a grant for maintenance was being made to Mohan Kunwar by her stepsons can be reconciled with the fact that the lady was being made responsible for a definite share of the debts which had been incurred by her late husband.

Their Lordships have considered both sides of these propositions and agree with both, but in regard to the latter they have further considered the exact nature of the transaction which is recorded in the deeds, and, as the result of their consideration, they find that the absolute interest which is in question in this case was created not by way of a transaction as in one of the precedents cited referred to, following a decree of the Court, but as the result of a transaction of a voluntary nature entered into by the two sons and the step-mother with considerations pro and contra ; and upon the whole their Lordships are of opinion that the view taken by the High Court must prevail.

The lady was made in point of fact responsible for a definite share of the debts as well as being made entitled to a definite share of the assets of her late husband. That transaction has stood, their Lordships are aware, for a very long period of time. There has been nothing cited to shake the facts which the documents record, and the balance of opinion is accordingly in favour of allowing a transaction which has in fact (through the fault of the appellants) remained so long unchallenged, to stand.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

R.D. *Appeal dismissed.*

Solicitors for Appellants — *Douglas Grant & Dold.*

Solicitor for Respondents—*H. S. L. Polak.*

*** * A. I. R. 1927 Privy Council 102**
(From Lahore)

3rd March 1927

LORDS PHILLIMORE, SINHA,
BLANESBURGH AND SALVESEN
Dhanma Mal and others—Appellants.

v.

Rai Bahadur Lala Moti Sagar—Respondent.

Privy Council Appeal No. 110 of 1925.

*** * (a) Registration Act, S. 17 (d)—Declaration purporting to set forth the terms of tenancy requires registration.**

A declaration signed by the Gumastha and manager of the firm, purporting to set forth the terms of tenancy of the land which on that day had been granted to the firm, is not receivable in evidence without registration being either a lease or counterpart of a lease within S. 17.

[P. 103, C. 1]

*** * (b) Civil P. C., S. 11—Review against decree enhancing rent of a tenancy and holding it to be permanent dismissed, holding however that judgment as regards permanent nature thereof was based on misapprehension—Judgment is not res judicata on the point of permanent nature.**

Where a review against a decree enhancing rent of a tenancy and holding it to be permanent was dismissed holding that the applicant was aggrieved not by decree but by judgment, but the pronouncement in which regarding permanent nature of the tenancy was however accepted by the Judge as having been based on misapprehension of counsel's argument on the subject, such a judgment cannot be res judicata as to the nature of tenancy.

[P. 103, C. 2 & P. 104, C. 1, 2]

*** (c) Civil P. C., S. 100—Question whether tenancy is permanent, is one of law.**

The proper effect of a proved fact is a question of law. The question whether a tenancy is permanent or precarious is one of a legal inference from facts and not itself a question of fact.

[P. 104, C. 2]

*** (d) Landlord and tenant—Permanent tenancy—Facts not constituting one, described.**

The facts that the tenant soon after the lease sold a portion thereof throwing on the vendees the responsibility of loss or damage which may be caused in case the lessor set up a claim against them, that in his written statement in the ejectment suit he did not plead permanent nature of the tenancy specifically and that in a previous suit he submitted to enhancement of rent, are in favour of the conclusion that the tenancy is not permanent : *A. I. R. 1922 Lah. 329, Affirmed.*

[P. 105, C. 1 & 2]

L. DeGruyther, W. Wallach and A. Afzul—for Appellants.

A. M. Dunne, G. R. Lowndes and B. Dube—for Respondent.

Lord Blanesburgh.—This suit relates to a plot of land about 2250 square yards in area situate in the Sudder Bazar in Delhi. The land belongs to the respondent. At the commencement of the suit it was in the occupation of the appellants at a rent of Rs. 25 per mensem. The buildings upon the land are the property of the appellants. The suit by the respondent as plaintiff is a suit in ejectment and for arrears of rent. The great question between the parties is as to the nature of the appellants' interest in the land. Were they, as the respondent contends, mere tenants at

will, or, as they themselves assert, are they entitled to a permanent inheritable right therein subject to the payment of a fixed rent?

The Subordinate Judge of Delhi decreed the suit. On appeal by the defendants the District Judge of Delhi dismissed it. On the 17th March 1922, the High Court of Judicature at Lahore, on second appeal by the plaintiff, reversed the decree of the District Judge and restored that of the Subordinate Judge, with a modification relating to the buildings on the land, to which their Lordships will refer later. This appeal to the Board is against the decree of the High Court. The appellants ask that the order of the District Judge be restored and that the suit against them be dismissed.

The appeal was elaborately argued before the Board, and the questions involved are very fully discussed in the judgments of the Courts in India. As a result, the effective issues are now reduced in number and simplified in character, and they can be dealt with by their Lordships, as they hope, with comparative brevity. It will be convenient at once to clear away certain matters preliminary in character which were much discussed in the Courts below.

The land in question had been let in or about the year 1871 by one Karim Baksh to a firm of Jais Raj and Khem Raj. The respondent is the successor in interest of Karim Baksh, and the appellants are the successors in interest of the firm. With a view of establishing that the appellants had become mere tenants at will of his, the respondent tendered in evidence at the trial a declaration, dated the 10th September 1871, signed by one Ghasi Ram, Gumastha and manager of the firm, purporting to set forth the terms of the tenancy of the land which on that day had been granted to the firm by Karim Baksh. The authenticity and authority of the declaration have not been proved, but its reception in evidence was objected to *in limine* by the appellants on the ground that the declaration was, or purported to be, a lease or counterpart of a lease which, under S. 17 of the Indian Registration Act, had to be, and had not been, registered. This objection was upheld by the trial Judge and by both of the higher Courts in India. Their Lordships are in entire agreement

with all the learned Judges on this point. The declaration, in their view, being unregistered, cannot, even if proved, be receivable in evidence in this suit. Accordingly, they dismiss from their minds both the declaration and its contents.

Up to March 1904, the rent paid for the land by the tenants had been Rs. 12-8 per mensem. In that month the respondent's father, who had by purchase become the ground landlord, served the then tenants—in substance, the present appellants—with notice requiring them to pay an enhanced rent of Rs. 25 per mensem or vacate the land, and on the 9th January 1905, filed a suit against them in the Court of the Subordinate Judge at Delhi claiming to recover arrears of rent at that rate of Rs. 25. This claim the defendants resisted, setting up, in terms to which their Lordships will later refer, a tenancy which had not then expired, and which, for present purposes only, may, without prejudice, be conveniently enough described as a permanent tenancy.

This suit was on the 16th January 1906, decreed by the Subordinate Judge. He held that the tenancy was not a permanent one, and that the plaintiff was entitled to enhance the rent to the extent which he claimed. From that decree the defendants appealed to the Divisional Judge. In the course of his judgment on the appeal, that learned Judge stated that on the question whether the tenancy was permanent or not he was disposed to differ from the view of the lower Court. He went on, however, to say, that in his view, it did not follow from the fact of the tenancy being permanent that the rent could not be enhanced, and he agreed with the lower Court in thinking that it should. Accordingly he affirmed the decree and dismissed the appeal. Thereupon an application for review of his order was made by the plaintiff on the ground that, although the decree was in his favour, the learned Judge had held that the defendants were permanent tenants, and that he had so held owing to a misapprehension of counsel's argument upon the subject. The Divisional Judge refused this application for a review while acknowledging that he had apparently misunderstood the argument addressed to him by the plaintiff's counsel. He

stated that in the circumstances he would have been prepared to allow the application if he had thought that it lay. In his judgment, however, such an application could only be made by a person aggrieved by a decree, and he added that it could not possibly be said in that case that the granting of a decree,

for enhancement of rent implies that the defendants are permanent tenants. If the decree could be said to involve any implication at all as to the nature of the tenancy, the implication would be the other way, namely, that the tenancy is not permanent. It is only the judgment by which the plaintiff is aggrieved. He is in no way aggrieved by the decree, and, therefore, he cannot apply for a review.

In the result the enhanced rent was decreed. No appeal against the order decreeing it was made by the defendants, and that rent has been paid by the tenants ever since.

Both parties now claim this decree as a *res judicata* in their favour. The appellants rely upon it as a pronouncement unappealed from and binding upon the respondent that their tenancy is permanent. The respondent relies upon it as a decree, now binding, that the tenancy is one with respect to which an order enhancing the rent can in proper circumstances be made, and that such a tenancy, whatever else it may be, cannot be a permanent tenancy.

Both of these contentions have been rejected by the Courts in India, and again their Lordships are in complete agreement with the learned Judges in this conclusion. It is impossible, in their Lordships' judgment, as a matter of ordinary fairness—to go no more deeply into the question—that after the plaintiff's application for review was refused for the reason given the previous expression of opinion of the District Judge that the tenancy was permanent could be relied upon by the defendants for any purpose whatever. The learned Judge, treating his pronouncement as entirely irrelevant, must be taken to have withdrawn it as the expression of a concluded opinion. For similar reasons the learned Judge's decree affirming the enhancement of rent, however, unjustifiable in point of law it was, if the tenancy were really permanent, cannot, their Lordships think, be treated as a pronouncement binding as between these parties that the tenancy was not permanent.

The order enhancing the rent is however, not without importance in the present litigation. The defendants, if their contention that the tenancy was permanent had been well founded, could have had that order discharged on appeal. They did not appeal, and they cannot now be heard to say that a less rent than the Rs. 25 which they have since paid without protest was alone properly payable. It may well be that neither party to the 1905 litigation was eager to put prematurely to the test the question so stoutly litigated in the present proceedings, but, as is shown by the plaintiff's application for review, and by the defendants' submission without appeal, to pay an enhanced rent, the hesitation on the part of the defendants was in this matter more pronounced than the reluctance of the plaintiff. The actual increase of rent was not a very serious matter, and it is not improbable that the defendants were content to submit to it, accompanied as it was by the District Judge's provisional expression of opinion favourable to their main contention, rather than risk an appeal, the result of which might have deprived them of that opinion for whatever it was worth. Their Lordships are unable to appreciate the contrary reasoning in this matter of the learned District Judge.

A third question, more formidable in character, must be disposed of before their Lordships further proceed. The learned District Judge, on appeal here, dismissed the respondent's suit, finding that the appellant's tenancy was permanent. It is thereupon contended by the appellants that this finding was one of fact by the learned Judge not open to review either by the High Court on second appeal or by this Board.

Now their Lordships would be the last to seek to abridge the effect of Ss. 100 and 101 of the Code of Civil Procedure or weaken the strict rule that on second appeal the appellate Court is bound by the findings of fact of the Court below. They are well aware, moreover, that questions of law and of fact are often difficult to disentangle. It is clear, however, that the proper effect of a proved fact is a question of law, and the question whether a tenancy is permanent or precarious seems to them, in a case like the present, to be a legal inference from facts and not itself a question of

fact. The High Court has described the question here as a mixed question of law and fact, a phrase not unhappy if it carries with it the warning that, in so far as it depends upon fact, the finding of the Court on first appeal must be accepted. On these lines, which the High Court appear strictly to have observed, the appeal to that Court was competent and it was in their Lordship's judgment open to the learned Judges there to entertain it as they did.

With the actual conclusion of the High Court their Lordships find themselves in agreement. They have heard in argument nothing which would lead them to disturb these findings, and it would be unprofitable again to discuss at length all the circumstances which influenced the learned Judges in the matter.

Their Lordships will refer only to three outstanding things which have deeply impressed them. The first is the sale deed of the 23rd August 1885—the only transaction of the kind that has taken place—by which Lachman Das, the then proprietor of the tenant firm, sold for Rs. 4,000 to Lala Mul Chand, the firm's entire interest in the amla then erected on the land and in the land itself. The assurance of the amla is absolute: the vendor's covenants for title are unqualified. As to the land, however, the vendees are to be responsible for loss or damage which might be caused to them in case the owner of the land raises a dispute or sets up a claim against them: the vendor is to have no concern therewith. This reserve, so soon after the original letting, strikes their Lordships as highly significant.

The Board also is struck with the terms of the written statement put in by Mul Chand and the other defendants in the 1905 proceedings. There is no proper allegation of a permanent tenancy there set up. The allegation is that the plaintiff is not entitled to enhance the rent so long as the defendants' building stands on the land: the plaintiff cannot eject the defendants so long as the building in question exists. In a statement on the defendants' behalf the allegation is that at the time of the erection of the building there was an oral agreement between the proprietor of the land and the defendants' predecessors in title that they would pay a fixed rent of Rs. 12-8

so long as the house to be erected was in existence. That is all. How far these pleas, even if they had been proved, were consistent with any permanent tenancy after the destructive fire of 1911 has not been investigated.

Lastly, their Lordships cannot get over the continued payment of the enhanced rent of Rs. 25 per mensem ever since the decree in the 1905 suit. It is not now in contest that such an enhancement of rent is entirely inconsistent with the notion of a permanent tenancy, and the continued payment by the appellants of that rent is a circumstance from the serious import of which they cannot now escape.

On the whole case their Lordships, agreeing with the High Court, are of opinion that no permanent tenancy has here been established.

By the order of the High Court the present appellants were permitted to elect within a period of three months whether, in lieu of removing them, they would accept for the buildings on the land the sum of Rs. 23,480 offered therefor by the respondent. Their Lordships have not been informed whether this matter has been left in abeyance pending the decision of this appeal. If it has, it would be proper, they think, that the period of election should be extended for three months from the date of His Majesty's Order in Council. With that variation the order of the High Court should, in their Lordships' judgment, be affirmed, and this appeal be dismissed with costs.

And their Lordships will humbly advise His Majesty accordingly.

D.D. Decree varied: Appeal dismissed.

Solicitors for Appellants—*T. L. Wilson & Co.*

Solicitor for Respondent—*H. S. L Polak.*

A. I. R. 1927 Privy Council 105

(From Rangoon)

28th February 1927

LORDS PHILLIMORE, CARSON AND
DARLING MR. AMEER ALI AND SIR
LANCELOT SANDERSON

Ma On—Appellant.

v.

Maung Tin—Respondent.

Privy Council Appeal No. 118 of 1925.

Possession—Jewels worn by a Burmese lady and taken by her to various places where she went—Presumption is that they were hers.

The mere fact that a woman wore the jewellery at her wedding would not go far towards proving that the jewels were hers as Burmans habitually borrow jewellery for great occasions. But her continued possession of the jewellery and her taking it away with her when she went to live at various places with her husband would raise a strong presumption that the jewels were hers. [P. 107, C. 1]

A. M. Dunne and E. B. Raikes—for Appellant.

Mr. Ameer Ali.—This appeal arises out of a suit brought by the plaintiff, Maung Tin, on the 21st February 1923, in the Court of the District Judge of Tharrawaddy in Burma. The action is for recovery from the defendant, Ma On, of certain jewellery which he alleged belonged to his wife, Ma Saw Yi, of which the defendant took possession on her death at Lotpadan on the 18th February 1920. The defendant, Ma On, who is the maternal aunt of the deceased Ma Saw Yi, and who admittedly was, at the time of Ma Saw Yi's death, at the house in which she died, denies taking possession of the jewellery claimed by the plaintiff, and further alleges that the jewellery the deceased girl used to wear was merely lent to her by different people, among them her grandmother Daw U.

The house in which Ma Saw Yi died belonged to Daw U and, as already stated, the defendant was there at the time of her death.

It appears to be the custom among Burmans to give the brides, at the time of marriage, jewellery by way of a dowry; and it is the plaintiff's case that the jewellery his wife was wearing at her wedding, which was of considerable value, was either her own or was given to her by her grandmother Daw U, according to the evidence on both sides, a wealthy woman. It is further the plaintiff's case that on his wife's death some jewellery was placed on her dead body, as appears to be the custom among Burmans; and that a photograph was taken of her with the jewellery in which she was dressed. The defendant admits that jewellery was placed on the dead body, but alleges that it was borrowed for the purpose.

The suit came for trial before the District Judge, Mr. Gilbert. His conclusion on the evidence may be given in his own words as follows:

That Ma Saw Yi was in possession of a considerable outfit of jewellery while she was living with Maung Tin, after the marriage, in the various stations to which he was posted is clearly proved. U Thein (4 P. W.) was a neighbour of Maung Tin at Tharrawaddy, and often saw Ma Saw Yi wearing diamond earrings, studs, bracelets, hairpins and a ring. Ma Ma Le (5 P. W.), when visiting Ma Saw Yi at Tharrawaddy, saw her wearing such jewellery; so did Ma Mya Gyi (6 P. W.) and Ma Yu Kin (7 P. W.), and Naung Gyi (9 P. W.). At Maymyo, Daw Ein Zi (15 P. W.), when staying a fortnight with Maung Tin and Ma Saw Yi, saw Ma Saw Yi wearing this jewellery. Ma Saw Yi spoke of them (the ornaments) as hers. Ba Bwa (11 P. W.), who used to live next door to Maung Tin at Maymyo, says that Maung Tin, when he went on tour, used to ask witness to look after this jewellery. Ma Saw Yi told witness that it was hers. Ba Bwa says he used to lock the things up in a safe at Maung Tin's house, while Maung Tin was away and sleep there. Ma Ein Zi, though Maung Tin was away on tour during part of a visit did not encounter Ba Bwa,—which at first sight seems to contradict Ba Bwa's statement. But it is probable that Ma Saw Yi, having a companion on this occasion did not feel the need of protection, and this would account for Ba Bwa's absence during Ma Ein Zi's stay at Maymyo. There is no reason to doubt the evidence that Ma Saw Yi was possessed of much jewellery while she was with her husband at Tharrawaddy and Maymyo.

Then comes the following passage:

The inherent vagueness of this case lies really in the fact that no attempt has been made by either party to trace the history of this jewellery, and show who was its purchaser or owner in the first instance. Plaintiff's case in effect rests on the bare fact that Ma Saw Yi, after her marriage, was in possession of a set of jewellery, and that the mere proof of possession is in itself adequate to raise a presumption of ownership. But this presumption is a weak one, since it is quite clear that Ma Saw Yi and her husband were never in a position to purchase these articles; and, in fact, it is not alleged that they did acquire them in any such manner. Maung Tin relies on an alleged gift. Neither the fact of this gift is proved, nor was the title of the alleged donatrix established. The weight of evidence in the case goes to show that these jewels were owned by Daw U and that, though Daw U was willing to lend them, she was averse to making an outright gift of them. Daw U's ownership of these jewels is not proved and cannot be inferred. There was, of course, every prospect at the time of the marriage that ultimately Ma Yi Saw would get these or similar articles by way of inheritance, and at Maymyo she even spoke of them as hers. But the mortality of Daw U, and her daughter Daw Me, and Daw Me's daughter Ma Saw Yi, followed a chronology which was the exact reverse of the expected sequence of deaths. The result of this was Ma Saw Yi died without acquiring title.

I think that Maung Tin has failed to establish his claim to this jewellery. I have already dealt with the question of the cash.

In this view of the case the District Judge dismissed the plaintiff's suit. The plaintiff appealed to the High Court at

Rangoon, and the appeal was heard by two learned Judges, one of them being Mr. Justice Heald and the other Mr. Justice Chari. Mr. Justice Heald has considerable experience of Burmese customs and institutions; his opinion on the respective allegations of the parties to the suit is of considerable value. He says, in the first place, that it is admitted by the respondent herself that Ma Saw Yi took the jewellery away with her when she left home and went to live with the plaintiff at Tharrawaddy, and that she had jewellery in her possession until she returned home ill not long before her death. He refers also to the admission of the defendant's sister Ma Gun and her witness Ma Thin Za that the jewellery Ma Saw Yi took with her to Tharrawaddy was the jewellery she wore at her wedding. He further refers to the fact that admittedly Ma Saw Yi took the jewellery that was in her possession to different places where her husband proceeded in the course of his official duties, such as Rangoon and Maymyo. The learned Judge adds that the defendant herself admits this, and her sister Ma Gun says that she took all the jewellery she had with her to Rangoon. He goes on to say as follows:

It is admitted that when Ma Saw Yi died her dead body was decked with jewellery, and there is some presumption that it was the jewellery which she had worn while she was alive.

It is noticeable, he observes further, that the articles of jewellery which were admittedly put on her correspond with the jewels which she had worn.

It is admitted that after the funeral the plaintiff asked for his wife's jewellery but was told that it did not belong to his wife, but to her grandmother. The comment of this learned Judge upon this statement is as follows:

I have no doubt that she did say so. The wife's relations would naturally resent her valuables going to a stranger. They nearly always do in such cases, and it is probable that that resentment is the sole reason for this litigation.

The learned Judge sums up the result of the evidence in the following words:

The mere fact that Ma Saw Yi wore the jewellery at her wedding would not go far towards proving that the jewels were hers, because Burmans habitually borrow jewellery for great occasions. But her continued possession of the jewellery and her taking it away with her when she went to live at the various places to which her husband, as a Government servant, was transferred, would raise a strong presumption that it was hers, particularly as her grand-

mother, to whom it is said to have belonged was rather miserly, and would not be likely to let her own valuables go out of her possession for anything like so long a time.

In the result, the High Court made a decree for the plaintiff for various articles of jewellery, amounting in value to rupees 20,000, with costs in both Courts.

Their Lordships have heard the defendant's counsel at considerable length; it is clear from the judgment appealed against that the learned Judges carefully examined the evidence on both sides, and their conclusion that the jewellery claimed by the plaintiff was the property of his deceased wife, and had been taken possession of by the defendant, is, in their Lordships' opinion, fully borne out by the circumstances. It is impossible to believe that Ma Saw Yi would have been allowed by the old grandmother, who was proved to have been a close-fisted woman, to take with her all the jewellery to the different places to which her husband was from time to time posted, unless this jewellery belonged to the deceased. Whatever might have been the origin of the articles, whether they were originally purchased by Daw U and were given by her by way of dowry to the plaintiff's wife at or about the time of the wedding, there can be no doubt on the evidence which has been carefully analyzed by the Judges of the High Court, that the deceased possessed them as her own property, and took them about as her own property. When she was in Rangoon, and her husband was away touring, the articles were taken care of by a neighbour who has given evidence on behalf of the plaintiff, and he says that it was at the plaintiff's request that he took care of his wife's jewellery. The inference which the High Court has drawn from the fact that on her death considerable jewellery was placed on her dead body is not without force in the circumstances of the case. It is hardly likely that borrowed jewellery would be placed on the dead person, and that seems to be the view of the learned Judge, to whose experience of Burma and Burmans the Board have referred to before.

On the whole, their Lordships see no reason to disturb the finding of the High Court, and would, therefore, humbly

recommend to His Majesty that this appeal should be dismissed. There will be no costs, as the respondent does not appear.

D.D.

Appeal dismissed.

Solicitors for Appellant — Douglas, Grant & Dold.

Respondent—*Ex parte.*

**** A. I. R. 1927 Privy Council 108**

(From Calcutta : A. I. R. 1925 Cal. 785)

3rd March 1927

VISCOUNT DUNEDIN, LORD SALVESEN
AND SIR JOHN WALLIS

Kala Chand Banerjee—Appellant.

v.

Jagannath Marwari and another—Respondents.

Privy Council Appeal No. 92 of 1925 :
Calcutta Appeal No. 3 of 1925.

** (a) *Provincial Insolvency Act* (1907), S. 16, Cl. (4)—*Property devolving on insolvent vests in Receiver as from date of devolution whatever the date of Receiver's appointment.*

The alternative in the section applicable to vesting in the Court is inserted to provide for the case of a Receiver not being appointed at the same time as the adjudication of insolvency and to foreclose an argument that vesting is suspended until the actual appointment of a Receiver. The Court only acts through a Receiver, and any estate acquired by or devolving on an insolvent is vested in him as from the date of acquisition or devolution whatever the date of the Receiver's actual appointment :
A I. R. 1925 Cal. 785. Reversed.

[P. 109, C. 1]

** (b) *Provincial Insolvency Act* (1907), S. 16, Cl. 15—*After adjudication secured creditor must deal with Court or Receiver and not the insolvent.*

Clause 5 does not mean that the secured creditor is entitled to deal with the security as though there had been no vesting in the Court or the Receiver. That the rights of the secured creditor over a property are not affected by the fact that the mortgagor or his heir has been adjudicated an insolvent is, of course, plain; but that does not in the least imply that an action against him may proceed in the absence of the person to whom the equity of redemption has been assigned by the operation of law. The latter alone is entitled to transact in regard to it, and he and not the insolvent, has the sole interest in respect of the property. A compromise in a mortgage suit between mortgagee and insolvent mortgagor is therefore a nullity : **A. I. R. 1925 Cal. 785, Reversed.** [P. 109, C. 1 & 2]

* (c) *Civil P. C.*, S. 11—*Parties.*

A person who applied to be made a party but was refused is not bound by the decision in the suit.

[P. 110, C. 1]

A. M. Dunne and E. B. Raikes—for Appellant.

L. DeGruyther and B. Dube—for Respondents.

Lord Salvesen.—This is an appeal from the decision of the High Court of Judicature at Fort William in Bengal, dated the 25th November 1924, by which the judgment of the Subordinate Judge of Asansol in zillah Burdwan, dated the 5th February 1923, was reversed and the suit dismissed with costs. The appellant prays that the decision of the High Court should be reversed and that of the Subordinate Judge restored.

The material facts are as follows: The appellant is the Receiver of the estate of Amulya Krishna Bose, who was adjudicated an insolvent on the 21st February 1914, by the District Judge of Bankura who, by the same order, appointed a Receiver of Amulya's estate. Amulya was the son of Tara Prasanna Bose, who, in February 1913, had executed a mortgage for the sum of Rs. 40,000 in favour of the defendants over certain properties that belonged to him. He failed to pay the mortgage interest, and on the 11th January 1913, mortgagees instituted a suit for foreclosure of the mortgage. After some procedure to which it is unnecessary to refer, a Solenamah was executed by the mortgagor and mortgagees under which it was agreed that the time for payment of the mortgage debt should be extended on the undertaking of the mortgagor to pay the interest regularly every year within the month of Chaitra. Failing such payment the mortgagees were to be entitled to foreclose. This Solenamah (or deed of compromise) was filed by the mortgagees on the 6th March 1915, but before any order was made the mortgagor, Tara Prasanna Bose, died on the 7th September. On his death it is matter of admission that the properties subject to the mortgage or the equity of redemption therein devolved by inheritance on the insolvent Amulya.

By Act 3, 1907, which contains the law applicable to the facts of the case, it is provided, S. 16, Cl. 4, as follows:

All such property as may be acquired by or devolve on the insolvent after the date of an order of adjudication and before his discharge shall forthwith vest in the Court or Receiver and become divisible among the creditors in accordance with the provisions of sub-S. 2, Cl. (a).

This provision is perfectly clear. The moment the inheritance devolved on the insolvent Amulya, who was still undischarged, it vested in the Receiver already

appointed, and he alone was entitled to deal with the equity of redemption. The alternative in the section applicable to vesting in the Court was no doubt inserted to provide for the case of a Receiver not being appointed at the same time as the adjudication of insolvency was made and to foreclose an argument that vesting was suspended until the actual appointment of a Receiver. The difficulty suggested by Ghose, J., is thus entirely unsubstantial. The Court only acts through a Receiver, and any estate acquired by or devolving on an insolvent is vested in him as from the date of acquisition or devolution whatever the date of the Receiver's actual appointment.

The mortgagor was of course a necessary party to the suit for foreclosure, Civil P. C., O. 34, R. 1; and, as on his death his interest devolved on the Receiver in the insolvency of Amulya Krishna Bose, the plaintiffs became entitled to continue the suit by leave of the Court against the Receiver: O. 22, R. 10. Instead of adopting this procedure, they chose to transact with the insolvent exactly on the same footing as if he were still undivested, and obtained from him a ratification of the deed of compromise. Proceeding on this, as the interest stipulated had not been paid, they obtained a preliminary decree against him on the 15th March 1916, and notwithstanding the subsequent intervention of the Receiver, to which reference is subsequently made in detail, a final decree was pronounced on the 31st August by which Amulya was debarred from all right to redeem the mortgaged property.

This procedure is said to be justified by the terms of S. 16 (Cl. 5) of the Act already referred to, which runs as follows:

Nothing in this section shall affect the power of any secured creditor to deal with the security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.

The learned Judges of the High Court interpret this clause as inferring that the secured creditor is entitled to deal with the security as though there had been no vesting in the Court or the Receiver. Their Lordships are clearly of opinion that this construction of the clause cannot be supported. That the rights of the secured creditor over a pro-

perty are not affected by the fact that the mortgagor or his heir has been adjudicated an insolvent is of course, plain, but that does not in the least imply that an action against him may proceed in the absence of the person to whom the equity of redemption has been assigned by the operation of law. The latter alone is entitled to transact in regard to it, and he and not the insolvent, has the sole interest in the subject-matter of the suit. To him, therefore, must be given the opportunity of redeeming the property. The contrary view would encourage collusive arrangements between the secured creditor and the insolvent and might involve the sacrifice of valuable equities of redemption which ought to be made available for the benefit of the unsecured creditors of the insolvent with whose interests the Receiver is charged. On this point their Lordships are in entire accord with the opinion of the Subordinate Judge.

The ratification by Amulya of the deed of compromise on which the decree against him proceeded was therefore a nullity, and the whole proceedings by which he was made a party to the suit were equally ineffective to bind the equity of redemption vested in the Receiver.

Counsel for the respondents was unable to adduce any argument in support of the above ground of decision of the High Court. He, however, strenuously maintained that the second ground, which is only expounded in the judgment of Ghose, J., was well founded. This is in effect a plea of *res judicata*, and is based on the intervention of the Receiver in the former suit. Having learned that the preliminary decree of the 15th March 1916 had been passed against Amulya, he filed two petitions on the 11th and the 16th April 1916. In these he contended that he and not Amulya should have been substituted for the deceased Tara Prasanna. He accordingly prayed that the Court should set aside the preliminary decree and make him a party in the suit as Receiver and to try the suit in his presence. It is admitted that he was never made a party—obviously on the ground that the Subordinate Judge took the same erroneous view of his rights as the Judges of the High Court in the present case. He was, however, heard on his objec-

tions and his objection to a final decree were repelled. In effect, therefore, it was urged that a decision had been given against him on the same argument which he has submitted here, and not merely so, but that he had appealed to the High Court, who had found the appeal incompetent—not specifically on the ground that he was not a party to the suit, but on a special ground, of the soundness of which their Lordships have no means of forming an opinion. All this, however, will not avail the respondents. The decree, which is pleaded as constituting *res judicata*, on the face of it bears that it was pronounced in a suit to which the appellant was not a party, and therefore does not come within the rule as to *res judicata* in S. 11 of the Civil Procedure Code, which only applies to matters which were in issue in a former suit between the same parties. The refusal to make the appellant a party to the suit cannot be treated as having the same effect as an order to the opposite effect, although it is plain enough from the judgments that if he had been made a party the result would have been the same in both the Courts in which he was heard on his petitions. It was suggested that the Receiver ought to have appealed from the decision of the High Court to this Board, but whether such an appeal at the instance of a person who was not a party to the suit would have been entertained may well admit of doubt. In any case the appellant who had done his best to be made a party to the suit and had failed, was quite entitled to proceed on the view that the decree against Amulya was not binding on him, and to take action in his own name to vindicate the equity of redemption as he has now done.

Their Lordships accordingly will humbly advise His Majesty that the appeal be allowed, that the decision of the High Court be reversed, and that of the Subordinate Judge restored—the appellant to have his costs in the Courts in India and of this appeal.

D.D. *Appeal allowed.*

Solicitors for Appellant—W. W. Box & Co.

Solicitors for Respondents — Ranken Ford & Chester.

** A. I. R. 1927 Privy Council 101

(From Oudh)

17th February 1927

VISCOUNT DUNEDIN, LORD DARLING,
SIR JOHN WALLIS AND SIR LANCELOT
SANDERSON

Raghunath Prasad Singh and others—
Appellants.

v.

Deputy Commissioner of Partabgarh
and others—Respondents.

** *Civil P. C., S. 110—Substantial question of law means one substantial between parties and not one of general importance.*

A substantial question of law does not mean a question of general importance but the words "substantial question of law" mean a substantial question of law as between the parties in the case involved. [P 110, C 2]

A. M. Dunne and Jopling—for Appellants.

L. DeGruyther and W. Wallach—for Respondents.

Viscount Dunedin.—This petition for special leave to appeal really turns on whether the case falls within the last clause of S. 110 of the Code of Civil Procedure. That section provides that where, as here, the subject-matter is over Rs. 10,000, then

where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law.

Admittedly here the decision of the Court affirmed the decision of the Court immediately below; therefore, the whole question turns upon whether there is a substantial question of law. There seems to have been some doubt, at any rate in the old Court of Oudh, to which this one succeeded, as to whether a substantial question of law meant a question of general importance. Their Lordships think it is quite clear, and indeed it was conceded by Mr. DeGruyther, that that is not the meaning but that the words "substantial question of law" mean a substantial question of law as between the parties in the case involved.

Mr. DeGruyther has really tried to show the Board that there is no substantial question of law by more or less taking up the merits of the case and showing that the decision is quite obviously right. Their Lordships do not think

that they would be quite in safety to take that view in a case which certainly occupied the Court below for a very long time and on which there is a very elaborate judgment. They therefore think that upon the face of the matter there is, as between these parties, a substantial question of law.

Their Lordships therefore humbly advise His Majesty that leave to appeal should be granted in this case.

D.D. *Leave granted.*

Solicitors for Appellants — *Barrow Rogers & Nevill.*

Solicitors for Respondents—*Solicitor, India Office.*

A. I. R. 1927 Privy Council 111

(From Patna)

4th March 1927

LORDS PHILLIMORE, CARSON, AND DARLING AND MR. AMEER ALI.

Dwarka Nath Singh and others—Appellants.

v.

Keshri Mall and others—Respondents.

Privy Council Appeal No. 125 of 1924 : Patna Appeal No. 44 of 1923.

Power of attorney—Power by two brothers to third to mortgage family property—Mortgage by the third to pay debts binding on family is valid—Hindu law—Alienation by coparcener.

A power of attorney executed by two brothers in favour of the third provided among other things "in respect of any mauza or share of land owned and possessed by us, the executants, the said Mokhtar-Am shall grant simple or Zarpeshgi-Thika or make mortgage with possession."

Held : that these words were quite sufficient to confer the power to execute mortgage for debts for which the joint family, consisting of the three brothers, was liable. [P 113, C 1]

W. Wallach and M. Afzal—for Appellants.

B. Dube—for Respondents.

Lord Carson.—The plaintiffs (respondents) who carry on the business of cloth merchants and money-lending at Gaya, brought the action against the defendants to enforce three mortgage bonds dated the 11th April 1911, the 13th July 1912, and the 5th November 1914, respectively. The plaintiffs claimed a decree for the payment of the principal and interest due under the bonds in suit, and in default

of payment thereof for the sale of the mortgaged properties belonging to the defendants, who are members of a joint and undivided Hindu family governed by the Mitakshara Law. The Defendants Nos. 1, 2 and 3, are brothers, and it appears that on the 7th January 1899, Dwarka Nath Singh, Defendant No. 1, and Kishun Prasad Singh, Defendant No. 3, executed a power of attorney in favour of Brijnath Singh, Defendant No. 2, which provided as follows :

If in any civil or criminal Court subordinate to the Calcutta High Court it be necessary for us, the executants, to appear personally and to make defence there the said Am Mokhtar himself shall appear and make defence in the cases on behalf of us, the executants, and in case of necessity shall depose on solemn affirmation or in respect of any mauza or share of land owned and possessed by us, the executants, the said Mokhtar-Am shall grant simple or Zarpeshgi-Thika or make mortgage with possession, or in times of necessity after borrowing up to Rs. 4,000 from anyone for expenses of cases, purchase of Milkiat and Mokarrari payment of public demands and other necessary and incumbent work relating to us, the executants, the Mokhtar-Am may execute mortgage deeds jointly with himself or in case of necessity may make our signatures upon the aforesaid bonds.

In April 1911, the sum of Rs. 2,837-12-0 was found due from the Defendants 1 to 3 to the plaintiffs after settlement of the account (Bahi Khata) and on the 11th April 1911, the said Brijnath Singh (Defendant No. 2), acting under the said power of attorney, executed a deed of mortgage purporting to be for himself and on behalf of his brothers, Defendants Nos. 1 and 3, in favour of the plaintiffs, and hypothecated certain joint family properties. It was for the sum of Rs. 3,300, which was made up of two items, viz., alleged antecedent debts due from the said defendants amounting to Rs. 2,837-12-0 and cash lent to Defendant No. 2 at the time of the execution of the mortgage, Rs. 462-4-0. The said Defendant No. 2 similarly executed a second mortgage in favour of the plaintiffs on the 13th July 1912, for Rs. 1,400, which was made up of three items alleged antecedent debts due from the Defendants 1 to 3—Rs. 505-13-0, Rs. 620 borrowed by Defendant No. 2 in order to discharge a decretal debt due from the defendants to Promotho Nath Mitter, and cash lent to the Defendant No. 2 at the time of the execution of the bond, amounting to the sum of Rs. 274-3-0. The third mortgage

bond was similarly executed by the Defendant No. 2 on the 5th November 1914, in favour of the plaintiffs for Rs. 2,000, which consisted of two items viz., alleged antecedent debt due from the same defendants, Rs. 1,173-4-3, and cash lent to Defendant No. 2 for defraying the necessary household expenses at the time of the execution of the bond, Rs. 826-11-9.

The Defendant No. 2, who signed and executed the mortgage bonds sued upon, did not appear or contest the plaintiffs' claim, but the other contesting defendants, who are now the appellants, denied the genuineness and validity of the power of attorney or that the Defendants Nos. 1 and 3 had power to execute it, and also pleaded that the said mortgage bonds were beyond the authority vested in the Moktarnama—Defendant No. 2. They Mokhtar Am also alleged that the necessities indicated in said mortgage bonds were wrong and false.

The action was tried in the Court of the Subordinate Judge of Gaya, who after hearing the evidence gave judgment on the 23rd March 1920. On the question of the genuineness and validity of the mortgage bonds and the the passing of the consideration money, he stated as follows :

From the deposition of P. W. 1, P. W. 2, P. W. 3, P. W. 4 and P. W. 7, I am perfectly satisfied, and I hold it as a fact that the bonds in suit were duly executed and properly attested, and that Defendant No. 2 executed them for self and for his brothers, Defendants Nos. 1 and 3, in consideration of their previous debts due to the plaintiffs under Bahi Khata, as also in consideration of cash loans advanced on the occasions of each bond. There is no reason whatever why the aforesaid witnesses should not be relied upon. Previous debts have been satisfactorily proved by the voluminous account books and also by the Hath Chithas written and signed mostly by the Defendant No. 2 and partly by the Defendant No. 1.

The learned Subordinate Judge, however, held that upon the construction of the said power of attorney the Defendant No. 2 had no power to borrow more than Rs. 4,000, and that the terms of the power of attorney did not authorise the Defendant No. 2 to execute bonds for the price of cloth, etc., and the debts due under Bahi Khata, etc. In the result he dismissed the plaintiffs' claim for a mortgage decree against the defendants, but granted a simple money decree against Defendant No. 2 only for the amount

claimed, with costs and further interest at the rate of 6 per cent. per annum until realization.

Upon appeal by the present plaintiffs (respondents) to the High Court of Judicature at Patna (Civil Appellate Jurisdiction), that Court decided that upon the true construction of the power of attorney there was complete power in Brijnath Singh to borrow money on behalf of the joint family and for the purposes of the joint family, and to execute mortgage bonds on behalf of his brothers and himself jointly, and the learned Judges held that they were not prepared to agree with the argument that Defendant No. 2 had no power to enter into different mortgage transactions, each transaction being for a sum not exceeding Rs. 4,000, if it was necessary for him to do so on behalf of the joint family.

Their Lordships in the High Court examined each of the mortgage bonds in detail, and in each case held as regards the moneys which have been already referred to as antecedent debts on accounts stated (Bahi Khata) the same were moneys due for the joint family for which the Defendant No. 2 was entitled under the power of attorney to bind himself as well as his brothers by the execution of the mortgages to the extent of such debts. They, however, disallowed the "present advance" in each case on the grounds that there was no evidence that such advances were borrowed for joint family necessity.

The High Court, therefore, on the 1st August 1923, allowed the appeal and set aside the judgment and decree passed by the Subordinate Judge and gave a decree to enforce the mortgage bonds on the terms and for the amounts already indicated. From that judgment the present appeal has been presented to His Majesty in Council.

It is to be observed that both the Courts below have held that the sums of money in respect of which the decree appealed from has been made constituted antecedent debts due by the Defendants Nos. 1 to 3 to the plaintiffs under Bahi Khata, and it was necessary for the said defendants to pay off such sums to the plaintiffs. Under the circumstances their Lordships see no reason for differing from the conclusions arrived at by the appellate Court. Their Lordships think it unnecessary to decide, as the

High Court did, whether the power of attorney authorized the Defendant No.2 to borrow in excess of Rs. 4,000 by different mortgage transactions, as, having regard to the findings referred to that the sums mentioned in the respective mortgages and for which the decree has been given in the High Court were debts for which the joint family was liable, their Lordships consider that under the earlier words in the power of attorney, throughout relied on in the High Court, viz.,

or in respect of any mauza or share of land owned and possessed by us, the executants, the said Mokhtar-Am shall grant simple or Zarpesghi-Thika or make mortgage with possession, are quite sufficient to confer upon the Defendant No. 2 the power to execute the several mortgage bonds for the amounts specified by the High Court.

Their Lordships are therefore of opinion that this appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

D.D. Appeal dismissed.

Solicitors for Appellants—W. W. Box & Co.

Solicitor for Respondents—Hy. S. L. Polak.

* * A. I. R. 1927 Privy Council 113

(From Allahabad)

4th March 1927

VISCOUNT DUNEDIN, SIR JOHN WALLIS
AND SIR LANCELOT SANDERSON
Sheobaran Singh—Appellant.

v.

Mt. Kulsum-un-nissa and others—Respondents.

Privy Council Appeal No. 139 of 1924 :
Allahabad Appeal No. 6 of 1920.

(a) *Wajib-ul-arz—Construction—Custom of pre-emption was held proved.*

A *wajib-ul-arz* provided : " Each co-sharer is entitled to transfer his property, but he should transfer it first to a co-sharer, the descendant of a common ancestor, and in case of refusal on his part to other co-sharers in the village, and if they also do not take it, then to anyone he may like. If there be any dispute between the transferer and the person having a right of pre-emption as to the amount of price, then it will be decided with reference to the rate at which property is sold in the neighbouring villages.

Held : that it was a record of custom of pre-emption. [P 114, C 2]

(b) *Wajib-ul-arz—Record of custom of pre-emption is good evidence.*

A statement in the *wajib-ul-arz* of a village

that there is a custom of pre-emption, which is not in contravention of law, is good prima facie evidence of the custom, without corroborative evidence of instances in which it has been exercised : 37 All. 129 (P. C.), Ref. [P 114, C 2]

(c) *Wajib-ul-arz—Unless contrary is shown, record of pre-emption is one of custom.*

In some *wajib-ul-arzes* language may be found which shows clearly an attempt to create a right of pre-emption. In others, there is an obvious contract between the co-parceners for a right of pre-emption. But where the contrary is not shown, a provision in a *wajib-ul-arz* relating to pre-emption should be presumed to be the record of a custom: 33 All. 196 (F.B.), Appr. [P 115, C 1]

* (d) *Custom—Custom proving well established adjunct to ordinary law can be easily proved.*

It is easier to hold established a custom, which only proves a well-recognized adjunct to the ordinary law, than it is where the law is said to be actually altered, as, e. g., in the case of a change in the rule of succession. [P 115, C 1]

** (e) *Pre-emption—Sale by Official Assignee is affected by right of pre-emption as a private sale.*

In every system of law the term may vary, but in all there is an official, be he called an assignee or trustee or any other name, and that official is by force of the statute invested in the bankrupt's property. But the property he takes is the property of the bankrupt exactly as it stood in his person with all its advantages and all its burdens. Hence a sale of bankrupt's property by Official Assignee is subject to right of pre-emption if any. [P 115, C 1, 2]

L. DeGruyther and B. Dube—for Appellant.

A. M. Dunne and W. Wallach—for Respondent.

Viscount Dunedin.—In this case, pre-emption in a share in a village is claimed by a co-sharer as against the buyer from the assignee in bankruptcy of another co-sharer. The claim was decreed by the Subordinate Judge, but his judgment was reversed and the case dismissed by the High Court of Allahabad on appeal.

There was another like suit by another co-sharer.

The circumstances are these: Rai Bahadur Sri Krishan Das was a co-sharer of the plaintiff and the others in the village of Peotha Gokalpur. On the 26th September 1913, he was declared insolvent by the Bombay High Court, and all his property, including the share in question, was vested in the Official Assignee of Bombay. The Official Assignee put up the property, for sale at Aligarh by public auction on the 8th November 1914. A bid was made but was not accepted by the Official Assignee, and

the sale was re-advertised for the 6th December 1914. A bid of Rs. 40,000 was made by one Sheoraj Singh and he was declared purchaser, subject to confirmation by the Official Assignee. On the next day the auctioneer received a private offer of a greater amount. The result of the private offer was that the property was sold privately for Rs. 41,000 to a purchaser, since dead, who is represented by the respondents. The plaintiff and appellant alleges that there was in this village a customary right of pre-emption among the co-sharers, and that he is entitled to have that right made good. It was objected by the respondents that the appellant ought to have exercised his right of pre-emption by bidding at the sale. There was a good deal of discussion as to whether the right of pre-emption was always open until a concluded sale, or whether the person in right of pre-emption, if he finds the property is going to be exposed to public sale, is bound to go there and bid. It is unnecessary to consider this matter for this reason, that it appears that what was put up at the auction was not the property pure and simple, but the property plus arrears of rent all in one lot, so that the only sale of the property pure and simple was the private sale, of which, admittedly, the appellant had no notice.

The further defence was twofold and consists of two parts: (1) a denial of the custom of pre-emption in the village; (2) an argument that if such pre-emption is assumed or proved, it does not operate against the purchaser at a sale from an Official Assignee in bankruptcy.

As to the custom of pre-emption, the Subordinate Judge held this proved. The High Court did not enquire as to whether this was so or not; they decided in favour of the respondents in the second point on the assumption that the custom was proved. Before this Board, however, the respondents strongly urged no custom had been proved.

Admittedly, the proof in favour of the custom is provided only (for oral testimony may be disregarded) by an entry in the *wajib-ul-arz* of the village, which is as follows:

'*Wajib-ul-arz*' of mauza Piplat Gokulpur, par-gana Koil, district Aligarh, prepared in 1280 Fasli.

Paragraph 18.—As to the transfer of property and the right of pre-emption: Each co-sharer is entitled to transfer his property, but he should

transfer it first to a co-sharer the descendant of a common ancestor, and in case of refusal on his part to other co-sharers in the village, and if they also do not take it, then to anyone he may like. If there be any dispute between the transferrer and the person having a right of pre-emption as to the amount of price, then it will be decided with reference to the rate at which property is sold in the neighbouring villages.

The respondents argued that a *wajib-ul-arz* alone is not sufficient, and that the present entry does not actually mention custom, and may, therefore, refer to contract and not to custom.

The weight to be given to entries in *wajib-ul-arz* has been considered on more than one occasion by this Board.

In the case of *Digamber Singh v. Ahmad Said Khan* (1) the custom of pre-emption was held good, and it was laid down that a statement in the *wajib-ul-arz* of a village that there is a custom of pre-emption, which is not in contravention of law, is good *prima facie* evidence of the custom, without corroborative evidence of instances in which it has been exercised. And upon the entry in the *Wajib-ul-arz* alone, the custom was held proved.

In the case of *Balgobind v. Badri Prasad* (2), though it was a case where it was sought actually to alter the law of inheritance, nevertheless, their Lordships said this:

When it is not shown by reliable evidence that the settlement officer neglected to perform his duty or was misled in recording a custom, and it does not appear that the statement of the custom is ambiguous, the record in a *Wajib-ul-arz* of a custom is most valuable evidence of the custom, much more reliable evidence than subsequent oral evidence given after a dispute as to the custom has arisen.

They found the custom proved.

The respondents appealed to the case of *Anant Singh v. Durga Singh* (3), where an alteration of the law of inheritance was held not proved, but the ratio decidendi is clearly given in the judgment of the Board, where it is said:

Where, as here, from internal evidence it seems probable that the entries recorded connote the views of individuals as to the practice that they would wish to see prevailing rather than the ascertained fact of a well-established custom, the learned Judicial Commissioners properly attached weight to the fact that no evidence at

(1) [1915] 37 All. 129=28 I. C. 31=42 I. A. 10 (P. C.).

(2) A. I. R. 1923 P. C. 70=45 All. 413=50 I. A. 196 (P. C.).

(3) [1910] 32 All. 233=6 I. C. 787=37 I. A. 191 (P. C.).

all was forthcoming of any instance in which the alleged custom had been observed.

The respondents sought to say that the entry here was ambiguous and to criticize it on the ground that it did not use the word "custom" and therefore might be a record of either a contract or mere wish and intention. On this point their Lordships wish to refer to a very valuable judgment by Chamier, J., in a Full Bench judgment in the case of *Returaji Dubain v. Pahlwan Bhagat* (4). He points out that the terms of the circulars show that the revenue authorities meant customs of pre-emption to be recorded in brief and general terms, and he sums up the situation thus:

We have all of us seen *Wajib-ul-arzes* which contain provisions which ought not to be in them. In some, no doubt, language may be found which shows clearly an attempt to create a right of pre-emption. In others there is an obvious contract between the co-parceners for a right of pre-emption. But where the contrary is not shown, a provision in a *Wajib-ul-arz* relating to pre-emption should be presumed to be the record of a custom, and this rule has been affirmed repeatedly by this Court.

It is also to be kept in view that it is easier to hold established a custom, which, as here, only proves a well-recognized adjunct to the ordinary law, than it is where the law is said to be actually altered, as, e.g., in the case of a change in the rule of succession. In the present case their Lordships have no doubt that the entry in the *Wajib-ul-arz* is a record of a custom, and they hold the custom proved.

Turning now to the second point, which affords the ground of judgment in the High Court. Their ratio decidendi is really contained in a single sentence:

Now, in the circumstances of the present case, this being the custom, it is clear that no co-sharer has sold his share at all.

And again:

We find it impossible to hold the view that a village custom which refers only to a voluntary sale by one co-sharer of his property can in any way apply to the case of an involuntary sale carried out against his wishes by a Court through a Collector or an Official Assignee, or anybody else.

With deference to the learned Judges it seems to their Lordships that this overlooks one of the fundamental principles of all arrangements for the realization and distribution of a bankrupt's property. In every system of law the term may vary, but in all there is an

official, be he called an assignee or trustee or any other name, and that official, is by force of the statute invested in the bankrupt's property. But the property he takes is the property of the bankrupt exactly as it stood in his person, with all its advantages and all its burdens. The working out of the view taken by the learned Judges would lead to curious results. After all, in a custom of pre-emption there is, so to speak, a debtor and creditor side: the debtor side is the obligation of the holder of the share to offer it to a co-sharer; the creditor side is the right of the co-sharer to buy. The property, if fettered, would be presumably somewhat less valuable than if it were free. But if the view of the learned Judges were right, the bankruptcy of A would have the double effect of forfeiting something belonging to B and of rendering the property of A more valuable in the hands of his official assignee than it was in his own.

It was pointed out that a sale in execution of a decree transferred the property free from a claim of pre-emption. The reason is simple. The Code of Civil Procedure arranging for sale under a decree mentions and deals with rights of pre-emption and gives those who hold them certain rights. Now whenever a statute deals with certain rights it is easy to conclude that it deals with the total ambit of those rights and leaves nothing standing outside the provisions of the statute. An illustration of this doctrine may be found in the case of *Att. Gen. v. De Keyser's Royal Hotel* (5). As an illustration of how there is no privilege of person may be taken the case of *The Collector of Fattehpore v. Syud Yad Ali* (6), where the Government as standing in right of a convict had to submit to the right of pre-emption. Just, therefore, as if the conveyance had been made to an individual, that individual would have had at once the disadvantage and the privilege of the custom of pre-emption, so the Official Assignee was in the same position and could only sell what he got.

Their Lordships will therefore humbly recommend His Majesty that the appeal should be allowed and the judgment of

(4) [1911] 33 All. 196=7 I. C. 680=7 A. L. J. 1040 (F.B.).

(5) [1920] A. C. 508=36 T. L. R. 600=89 L. J. Ch. 417=64 S. J. 513=122 L. T. 691.

(6) 1 N. W. P. H. C. Rep. 88.

116 Privy Council NAYAN MUNJARI v. KHAGENDRA NATH (Viscount Dunedin) 1927

the Subordinate Judge restored, the appellant to have his costs before this Board and in the Courts below.

D.D. *Appeal allowed.*

Solicitors for Appellant—*Douglas, Grant & Dold.*

Solicitor for Respondents —*S. L. Polak.*

* A. I. R. 1927 Privy Council 116

(From Calcutta)

7th March 1927

VISCOUNT DUNEDIN, LORD SHAW, SIR
JOHN WALLIS AND SIR LANCELOT
SANDERSON

Srimati Nayan Munjari Dasi—Appellant.

v.

Khagendra Nath Das and others—Respondents.

Privy Council Appeal No. 109 of 1925 :
Calcutta Appeal No. 22 of 1924.

* *Compromise—Construction—Terms providing for payment of prevailing rate of rent—Rent was held enhanceable.*

The terms of the compromise between landlord and tenant were that for the seven years, the tenant shall pay a certain rent and after the expiry of the aforesaid stipulated period the tenant shall possess and enjoy the said land on payment of the then proportionate reasonable ground rent. On the tenant agreeing to pay proportionate ground rent of the said land, the landlord shall not be able to settle the said land with any other person; but if the tenant refuses to pay such rent, he shall amicably surrender such land; if he fails to do so, then the landlord shall be able to eject him from the said land, and the latter shall be bound to pay to the landlord such damages as he will suffer on account of breach of the said agreement.

Held: that the meaning of the compromise was that the lease is binding so long as the tenants are content to pay the prevailing rent of such land to be gathered from what is given for land in the neighbourhood.

[P. 117, C. 1; P. 116, C. 2]

G. R. Lowndes and E. B. Raikes — for Appellant.

J. M. Parikh—for Respondents.

Viscount Dunedin. — This suit is raised by the guardian of a female lunatic who is entitled to the property of certain lands at Howrah against the occupying tenants thereof. The plaintiff alleged that the defendants, now respondents, were tenants at will who had hitherto paid a rent of Rs. 7-8 per mensem. But a notice has been served on

them to pay henceforth a rent at the rate of Rs. 3 per mensem per cottah.

The land in extent is, roughly speaking, 22 cottahs, so that the rent demanded is Rs. 66, now alleged to be the prevailing rent of land in the neighbourhood. In the event of the defendants not signifying their willingness to do so, the plaintiff holds herself entitled to evict them.

The plaintiff alleged that no answer had been given, and craved eviction, but alternatively, if eviction was not granted, then a decree declaring that the rent henceforth was to be Rs. 3 per mensem per cottah.

The history of the terms of the tenancy are as follows:

In 1895 a suit had been instituted by the father of the defendants against the first plaintiff's deceased husband to have him ordained to execute a perpetual lease. This suit was compromised. The terms of the compromise were that for the seven years from 1896—1903 the tenants should pay a rent of Rs. 4-6, and then it continued as follows:

That after the expiry of the aforesaid stipulated period ending in the month of Chaitra (1309) thirteen hundred and nine B. S. the plaintiff shall possess and enjoy the said land on payment of the then proportionate reasonable ground rent. On the plaintiff agreeing to pay proportionate ground rent of the said land, the defendant shall not be able to settle the said land with any other person; but if the plaintiff refuses to pay such rent, he shall amicably surrender such land; if he fails to do so, then the defendant shall be able to eject him from the said land, and the latter (the plaintiff) shall be bound to pay to the defendant such damages as he will suffer on account of breach of the said agreement.

In 1903 the rent was accordingly enhanced to Rs. 7-8, and that was the rent which was paid as at the date of this suit. The position taken by the defendants, now respondents, in this suit was that the true meaning of this clause was to allow one increase only to be made, and that having been made in 1903 the rent must thereafter continue at that figure in perpetuity. Alternatively, they denied that Rs. 3 per mensem per cottah was the prevailing rate in the neighbourhood.

The case was tried in the Court of the Munsiff of Howrah. That Judge settled certain issues, of which three may be mentioned:

What were the terms of the Solenamah in Title Suit No. 46 of 1895 of the Court of the Second

Subordinate Judge, Hooghly? Have the terms of the Solenamah been fulfilled by the defendants? If so, can the plaintiff claim any further enhancement of rent or ejectment?

What is the nature of the tenancy of the defendants? Is it ejectable?

To what relief, if any, is the plaintiff entitled?

One witness on each side was examined. The witness for the plaintiff said that the prevailing rent for such land was Rs. 3 per mensem per cottah and that he had Collector's papers to show this. No cross-examination was had as to these papers.

The witness for the defence simply denied that this was the proper prevailing rate.

The Munsiff held on the fourth issue that the true meaning of the compromise was that the landlord could enhance the rent after the seven years up to the prevailing rent of neighbouring lands, and that if that was not paid, he could ask for ejectment, but he said he did not consider that there was any proof of what the prevailing rent was. Issue five had been settled by this answer to Issue 4 and on Issue 6 he dismissed the suit.

Appeal was taken to the District Judge at Howrah. His view of the compromise decree was that the tenant might ask for one 7-years term at an enhancement of rent, but that after that the tenancy was a tenancy at will. He accordingly allowed the appeal and decreed khas possession, i. e., he granted ejectment.

A second appeal was then taken by the defendants to the High Court. That Court restored the judgment of the Munsiff, holding that the meaning of the compromise term was that so long as rent was paid at the prevailing rate, the tenants were entitled to hold. The question of the rate they dealt with by merely saying that the Munsiff had found that the rate of Rs. 3 was not proved.

Their Lordships are of opinion that the High Court has put the right construction on the compromise decree, that is to say, that the lease is binding so long as the tenants are content to pay the prevailing rent of such land as such prevailing rent may be gathered from what is given for land in the neighbourhood. They could not, however, come to the conclusion that the question of what the prevailing rent truly is has been satisfactorily dealt with. The Munsiff was, they think, too peremptory in deciding

that there was no evidence. The evidence of the plaintiff's witness was quite clear, and he said that he had Collector's documents to show that what he was stating was true, and there was no cross-examination on the point.

Their Lordships think it probable that the efforts of the pleaders were too much directed to the extreme position asserted on either side.

The parties have shown themselves very reasonable and have consented to abide by the determination of a person to be appointed by the Court.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed and the case remitted to the High Court for them to appoint an independent person to fix what is the prevailing rent in the neighbourhood and report, and on that report being received the High Court will pronounce a decree accordingly, that is to say, if the defendants are willing to pay they shall continue as tenants, but if not, eviction shall be granted. No parties shall have costs either before the Board or in the Courts below, and any costs already paid must be returned.

D.D.

Case remanded.

Solicitors for Appellant — *Watkins & Hunter.*

Solicitors for Respondents — *Downer & Johnson.*

* A. I. R. 1927 Privy Council 117

(From Calcutta)

4th March 1927

LORD PHILLIMORE AND DARLING,
MR. AMEER ALI AND SIR LANCELOT
SANDERSON

Basiram Saha Roy and others—Appellants.

v.

Ram Ratan Roy and others—Respondents.

Privy Council Appeal No. 55 of 1925 :
Calcutta Appeals Nos. 89, 90 and 91 of 1923.

* (a) *Civil P. C., S. 100—Findings of fact—High Court as well as Privy Council is bound to accept—Privy Council.*

Findings of first appellate Court are conclusive and the High Court and the Privy Council are bound to accept them without further enquiry.
[P. 119 C. 2]

(b) *Bengal Estates Partition Act* (5 of 1897), S. 99—*Construction*.

The Act does not apparently contemplate any tertium quid between common tenancy and several holding. [P. 120, C. 1]

* (c) *Grant—Construction—Principles*.

A grant in respect of its amplitude is always construed (unless it be a Crown grant) against the grantor. [P. 120, C. 2]

(d) *Bengal Estates Partition Act* (1897), S. 99—*Applicability*.

Grants of a share in specified mouzas which are themselves only portions of an estate held in common tenancy come under S. 99. [P. 120, C. 2]

G. R. Lowndes and E. B. Raikes—for Appellants.

H. N. Sen—for Respondents.

Lord Phillimore.—On the 9th April 1868, the principal respondent gave putnis or perpetual leases of certain properties to the present appellants or to persons from whom the present appellants derive title.

The material part of one of the putnis is expressed in the following terms :

The Zamindari No. 2049 of the aforesaid pargana, standing in the names of the Chowdhuries, and held in our ownership, is recorded in the Collectorate of district Backergunj at a sudder jumma of Rs. 1,280-15-6½ pies. A 12 gundas 1 kara 13 tils 1½ krant share out of the 1 anna 11 gundas 2 karas of the 1 anna 14 gundas hissyas of Raghu Nath Chowdhury appertaining to the 8 annas 10 gundas hissyas of the aforesaid zamindari, that is, a 6 annas 5 gundas share out of the aforesaid 1 anna 11½ gundas hissyas taken as 16 annas, belongs to us, and of which we are in enjoyment and possession on payment of the sudder rent. As we are unable to till, cultivate and settle the lands appertaining to the aforesaid hissyas, we, of our own accord, grant you in writing a putni talukdari pottah of mouzabs Chhoto Dumaria, Gopalpur, Narayankhana, Dharabashail, Kandi, Suagram, Shalukha, Chhatian, Patiljhapa, Bahirshamli, Korya, Rarirbilla, Ghagharkanda, except the debottar, and the kismats appertaining thereto, at the annual rent of Rs. 145.

The other putni is in similar terms.

The zamindari in question is of a very great extent, and as appears from the passage in the putni lease which has just been quoted, the ownership of it has broken up into various divisions and subdivisions. There are said to have been 300 proprietors.

In 1897 a purchaser from one of those sharers applied under Bengal Act No. 5 of 1897 for a partition. This application was resisted by some of the other proprietors but the Collector granted it, and in process of time a regular partition was effected, and the property was divided into 28 different estates.

As a result of this partition, the mouzas allotted to the respondents were not those mentioned in either of the putni leases of 1868.

Thereupon the appellants, relying upon Clause 99 of the Partition Act, claimed that their putni leases should be held good as regards the lands allotted under the partition to the respondents and this claim being resisted they brought three suits, which have now been consolidated, for possession and mesne profits.

The Subordinate Judge dismissed the suit. On appeal the District Judge reversed that decision, worked out the extent to which the appellants would be entitled to compensation lands, and gave the appellants a decree for possession of them with mesne profits and a proportion of the costs.

It should be stated that, in the view of the District Judge accurate calculation would have given to the appellants a somewhat larger share, but that they were content to accept the decree in the form prepared by the District Judge in order thereby to avoid intricate calculations.

This judgment of the District Judge was, however, reversed on appeal by the High Court, which dismissed the suit. Hence the present appeal.

In order that the decisions in this case may be rightly appreciated, it is desirable to set out the material part of Ss. 4 and 7 and the whole of S. 99 of the Partition Act.

Section 4.—(1) Subject to the provisions of this Act, every recorded proprietor of a joint undivided estate who is in actual possession of the interest in respect of which he is so recorded shall be entitled to claim a partition of the said estate and the separation therefrom and assignment to him as a separate estate of land representing the interest of which he is in such possession.

Section 7.—(1) Where the lands of an estate have been divided by private arrangement formally made and agreed to by all the proprietors, and each proprietor has, in pursuance of such arrangement, taken possession of separate lands to be held in severalty as representing his interest in the estate, no partition of the estate shall be made under this Act except—

(a) on the joint application of all the proprietors ; or

(b) in pursuance of a decree or order of a civil Court.

Section 99.—If any proprietor of an estate held in common tenancy and brought under partition in accordance with this Act has given his share or a portion thereof in putni or other tenure or

on lease, or has created any other encumbrance thereon, such tenure, lease or encumbrance shall hold good as regards the lands finally allotted to the share of such proprietor, and only as to such lands.

In the view of the Subordinate Judge the parent estate was, previous to the formal partition of 1897, already enjoyed by its co-owners in severalty under a private partition. He also thought that the appellants had not really been dispossessed of their former putni lands, and that the suits were not brought bona fide, but in order to get more convenient lands in substitution for those specified in the original putnis. He further held that the owners of the estates in which the mouzas leased by the original leases had fallen ought to have been made parties to the suits so that, if this should be found to be the right course, the appellants might be confirmed in the possession of their original mouzas.

The District Judge, whose conclusion on matters of fact must, according to law be accepted (see Code of Civil Procedure, Ss. 101 and 102), found that the estate had not been partitioned privately or at all before the partition of 1897, and that the estate was at that time still held in common tenancy. This being so, the provisions of S. 99 applied if the putni leases in question were to be considered as leases of a share or portion of the joint lands, and there having been no suggestion up to that stage that the putni leases were other than leases of sharers or portions, he decreed in favour of the appellants, as already stated.

The Judges of the High Court took the view that he had not found conclusively and so as to bind them, that the estate was previous to the partition held in common tenancy.

Deeming themselves at liberty to take their own view of the facts in this respect, the learned Judges thought that the lessors had been holding in severalty, and further that the putni leases were not leases of shares or portions, but of specific villages, and therefore that S. 99 did not apply.

This second point, which had not apparently been put before the Courts at earlier stages, was taken in the memorandum of appeal to the High Court and whether as a substantive point in itself or as supporting the view that the estate was no longer held in common tenancy,

deserves consideration, and has been fully considered by their Lordships.

With regard to the first point, the learned Judges of the High Court expressed themselves in the following language :

The Court of first instance dismissed the suit on the finding that the proprietors of the estate did not hold the land in common tenancy. That decision was reversed by the lower appellate Court on the finding that there was no previous private partition or private arrangement formally entered into by all the proprietors by which each proprietor was in separate possession of some specific land as appertaining to his share in the zamindari.

On behalf of the respondents it is contended that this finding of the lower appellate Court is a finding of fact which is conclusive in second appeal. We are unable to accept this contention. We are bound to accept the finding that there was no formal private partition. But on the facts admitted in the plaint and found by the lower appellate Court we are unable to hold that S. 99 can be made applicable to the present case. On the plaintiffs' own case their lessors were in actual exclusive possession of these 30 villages, and the plaintiffs are further in this dilemma that unless at the time the putni lease was granted this separate possession was consented to by the other co-sharers, they could not have obtained a valid putni lease.

These observations show an insufficient appreciation of the judgment of the District Judge. His language is as follows :

Under the circumstances stated and discussed above, I believe the plaintiff-appellant's evidence that the estate No. 4515 was held in common tenancy before the Collectorate partition of 1905

As there was no previous private partition or private arrangement formally made and agreed to by all the proprietors by which each proprietor was in separate possession of some specific lands as appertaining to his share in the zamindari, the plaintiffs can now well say under S. 99 of the present Estates Partition Act that his putni would hold good only in respect of the lands finally allotted to the share of the grantor of the lease.

He has distinctly found that the estate was held in common tenancy. This is a finding of fact which according to law is conclusive, and which the High Court and their Lordships are bound to accept without further enquiry. But their Lordships will add for the satisfaction of the parties that they would see no reason upon the papers for differing with the District Judge, if it was within their competency to examine the question.

The view to which the High Court leans is a view which one of their number—Mr. Justice Ghose—took in a previous case, a judgment which is printed in the appendix to the present appeal (*Dina Nath Saha Roy v. Chandra*

Kumar Bose, decided February 26th, 1923).^{*} It is a view that there is some tertium quid between common tenancy and several holding, and that when this tertium quid exists, if any formal partition supervene, it does not affect or interfere with the arrangement under which landowners who are in some respects still tenants in common may yet have specific shares of the estate allotted to their exclusive enjoyment.

The Act does not apparently, contemplate any such cases being possible. If they were to exist it would be strange if a formal partition could take away the possession of estates thus enjoyed from former possessors.

In the present case the partition has allotted to the lessors of the plaintiffs lands of which they had not the enjoyment before, and has not allotted to them the mouzas which are now in question.

It is to be observed that the appendix to this case shows that in another instance with similar circumstances the parties agreed that it was held in common tenancy (*Chandra Kumar Mukhopadhyaya v. Dina Nata Shaha Roy*).

The case of *Nagendra Mohan Roy v. Pyari Mohan Saha* (2), may be put on one side, as there the two Courts came to concurrent findings of fact.

There remains to be considered the objection that this is not a case which comes under S. 99 because the putni lease, it is said, is not a lease of a share or portion of the estate, but a lease of certain specified mouzas of which the lessors had control and some form of possession at the time when the leases were made, but which by operation of the partition have now been taken away from them.

If their Lordships took this view they would have to consider whether the lessors might not be compelled to make by way of equitable compensation a similar lease of the new mouzas which they had obtained in lieu of the former ones.

On the whole, however, their Lordships think that it will not be necessary to resort to this consideration.

Each lease purports to be a lease of that share in the estate which belongs to

the lessors. It is true that it specifically applies to certain mouzas of which the lessors have the enjoyment as representing their share, but it is obvious from the subsequent proceedings that this enjoyment was by convention only and subject to revocation and that as against their lessors, the lessees were entitled to say, "Give us your share, if it be not in these villages, then in those which you get instead." A grant in respect of its amplitude is always construed (unless it be a Crown grant) against the grantor.

It is true that there is no direct authority for such a case, but grants of a share in specified mouzas which are themselves only portions of an estate held in common tenancy, have been treated as coming under S. 99.

The fourth case printed in the appendix (*Gopal Chandra Biswas v. Basanta Kumar Saha Roy*, decided August 18, 1924) is to this effect.

The decision of the High Court of Calcutta upon the construction of a similar section in the earlier Partition Act, agrees with this (*Joy Sankari Gupta v. Bharat Chandra Birdhan* (3). Support is also lent by the decision of this Board in *Byjnath Lall v. Ramooddeen Chowdry* (4), in the case of a mortgage of an undivided share in certain specified villages which were themselves part of an estate held in common tenancy. This case, it is true, was decided before the Partition Acts and upon the construction of the regulations but it indicates the principle upon which subsequent legislation has proceeded. The observations on p. 119 are very much in point.

Their Lordships, therefore, are of opinion that the District Judge was right in holding that S. 99 applies to this case, and they will humbly advise His Majesty that this appeal should be allowed, and that the judgment of the District Judge should be restored with costs.

D.D.

Appeal allowed.

Solicitors for Appellants—*Watkins & Hunter*.

Solicitors for Respondents—*Ranker, Ford & Chester*.

^{*} The same conclusion on the facts was reached in another case similarly printed (*Prosanna Kumar v. Madhu Badya* (1)).

(1) A. I. R. 1923 Cal. 279.

(2) [1916] 43 Cal. 103 = 21 C. L. J. 605 = 30 I. C. 420 = 20 C. W. N. 319.

(3) [1899] 26 Cal. 434 = 3 C. W. N. 209.

(4) [1873] 1 I. A. 106 = 21 W. R. 233 = 2 Suthor, 942 = 3 Sar. 333 (P. C.).

* * A. I. R. 1927 Privy Council 121

(From Lahore)

11th March 1927

VISCOUNT DUNEDIN, LORD SALVESEN
AND SIR JOHN WALLIS*Niamat Rai and others—Appellants.*

v.

Din Dayal and others—Respondents.

Privy Council Appeal No. 60 of 1926.

* * (a) *Hindu Law—Alienation by Manager—Covenant by manager to indemnify vendee against loss if minor members challenged alienation is a reasonable precaution.*

Where family property was sold by manager with a covenant to indemnify the vendors in full should they suffer loss by reason of the minor members putting forward a claim after attaining majority.

Held: that insertion of such a clause is no more than a reasonable precaution against the undoubted risk that the vendors who were majors might afterwards make common cause with the vendors who were minors and endeavour by suppressio veri and suggestio falsi to get the sale set aside. [P 122 C 1]

* * (b) *Hindu Law—Alienation by manager for discharging old debts of family business and to carry it on is justified.*

Where a business is carried on with joint family funds for the benefit of the joint family, the properties of the joint family, both moveable and immovable, including the shares of minor members of the family, are liable for debts incurred in carrying on the business, and it is within the powers of the managing member in a proper case to sell immovable as well as the moveable property for the purpose of discharging such debts or enabling the business to be carried on. [P 122 C 1]

Where the manager sold family property for Rs. 43,500 to satisfy pre-existing debts to the amount of Rs. 38,000.

Held: that it was enough to support the sale without showing how the balance had been applied: A. I. R. 1927 P. C. 37, Ref. [P 123 C 1]

* * (c) *Hindu Law—Joint family business resulting in loss—Whether manager should put in more money or mortgage property rather than to sell it are questions for the manager and not for the lender or purchaser.*

Where there is a joint family business, the manager has authority to raise money not only for the payment of debt, but also for the purpose of carrying on the business. Where such a business had recently resulted in loss whether the managing member was justified in putting more money into it, and whether he should have raised money by mortgage instead of by sale are questions for the manager to decide and it would be unreasonable to require a lender or purchaser to go into questions of this kind, as to which he would rarely be in a position to form a sound opinion. [P 123 C 1]

*B. Dube—for Appellants.**L. DeGruyther and W. Wallach—for Respondents.*

Sir John Wallis.—This is an appeal from a decree of the High Court at Lahore reversing the decree of the District Judge of Ferozepore in Suit No. 40 of 1915, which was brought on behalf of Din Dayal and Bansari Basil, who were minors, to recover certain lands, the property of the joint family, which had been sold by Lachhman Das, the managing member of the family, to Defendants 2 to 6, under a sale deed dated the 1st January, 1913. Lachhman Das was made the first defendant, and Mt. Dhani, the mother of the minor plaintiffs, who had joined in executing the sale deed, was also impleaded as the seventh defendant. The suit was instituted by Dal Chand, the minor's brother-in-law, as their next friend. He stated to the Court that he had brought it at the instance of the elder minor, who, shortly afterwards attained majority, and was brought on the record as the first plaintiff and next friend of the minor second plaintiff. The plaint alleged that the sale had been made for a nominal sum of Rs. 43,500, that Lachhman Das, the first defendant, had not received the whole of the consideration, and that the sale was made without legal necessity and was not for the benefit of the minors. The price, Rs. 43,500, was shown to have been a very favourable one, and the District Judge found that it had been paid in full and that the sale was justified by necessity, as the family debts amounted to Rs. 38,400. This was the only question argued on the appeal to the High Court, who accepting the contention of the appellants' family counsel that at the time of sale the family debts were not shown to have exceeded some Rs. 22,000 or Rs. 23,000, held that the sale was made without legal necessity, and reversed the decree of the District Judge and decreed the suit without making it a condition that the plaintiffs should refund that portion of the consideration which was applied in the discharge of debts binding on the joint family.

A petition was presented for review of judgment, and in their order dismissing it the learned Judges observed that there was admittedly an arithmetical error in the body of the judgment, as the finding of the Court was that the debts binding on the family were not shown to have exceeded Rs. 30,000 (not Rs. 22,000 or

Rs. 23,000), so that the sale was unnecessary so far as Rs. 12,600 was concerned. As regards the omission to direct the repayment of the Rs. 30,900, the learned Judges observed that it had been admitted by the respondents' counsel at the hearing of the appeal that they were not entitled to insist on this, and that in these circumstances the judgment, though bearing hardly on the petitioners, could not be remedied, by review, but only by appeal.

The onus was, of course, on the defendants to show that the sale was justified, but it must be borne in mind that in this case the first defendant, Lachhman Das, and the minor plaintiffs were the members of a joint family who had succeeded to what is known as a joint family business—that is to say a business carried on with joint family funds for the benefit of the joint family, that the properties of the joint family, both moveable and immovable, including the shares of minor members of the family, are liable for debts incurred in carrying on the business, and that it is within the powers of the managing member in a proper case to sell immovable as well as moveable property for the purpose of discharging such debts or enabling the business to be carried on.

The sale deed of the 1st January 1913, contains a recital that it was necessary that the suit lands should be sold for trade business and payment of debt, and also a covenant by Lachhman Das, the managing member, and Mt. Dhani, the mother and natural guardian of the minor plaintiffs, to indemnify the vendors in full should they suffer loss by reason of the minors putting forward a claim after attaining majority. The learned Judges of the High Court appear to have regarded the insertion of this clause as a suspicious circumstance; but, in their Lordships' opinion, experience in this class of cases shows that it may have been no more than a reasonable precaution against the undoubted risk that the vendors who were majors might afterwards make common cause with the vendors who were minors and endeavour by *suppressio veri* and *suggestio falsi* to get the sale set aside. This, indeed, is precisely what has happened in the present case, where Lachhman Das, the managing member of the plaintiffs' family, and the actual

vendor, whom the defendants were under the necessity of calling to prove their case, sought to go behind his statement in the sale deed that it was necessary to sell the property for trade business and payment of debts, and gave evidence that the joint family business had come to an end before the date of the sale, that the debts which were discharged out of the sale proceeds were largely fictitious or incurred in speculative transactions of his own, and that there was no sufficient pressure of creditors to justify the sale.

These contentions were supported by very worthless evidence and were rightly rejected by the District Judge who proceeded to deal with the items which the first defendant deposed to in his evidence that he had paid on the 2nd and 3rd January 1913 after the receipt of the consideration money. Of these items, the District Judge found that Rs. 38,400 were proved to have been paid in discharge of debts owing at the date of the sale, and that a farther sum of Rs. 5,100 out of the sale proceeds had been invested in the business, and on these findings he rightly upheld the sale.

On appeal, a distinction, to which their Lordships will refer later, was taken between debts owing when the sale was negotiated and debts incurred subsequently but before the execution of the sale deed; and the learned Judges came to the conclusion that debts due at the date of negotiation should alone be taken into account, and on the admission of the appellants' counsel they found that these debts were not shown to have exceeded some Rs. 22,000 or Rs. 23,000, a figure which, as already stated, they raised on review to Rs. 30,900, which was Rs. 12,600 less than the amount of the purchase money. This figure of Rs. 30,900 included two debts, Items 1 and 2 in the District Judge's judgment, which had been incurred subsequent to the date of negotiation in discharge of earlier debts; and as regards Items 4 and 5, which the learned Judges disallowed, Mr. Dube has called attention to the evidence that Rs. 2,500 in Item 4 was borrowed to pay a previous debt, and that, as found by the District Judge, the two hundis, each Rs. 2,500, were given in renewal of previous hundis, thus showing that the whole of the Rs. 38,400 allowed by the

District Judge had been applied in discharge of liabilities existing at the time when the sale was negotiated. It was also proved that out of the balance of the purchase money, Rs. 5,000 odd, Rs. 4,100 were lent to another firm in the ordinary course of business and subsequently repaid. It appears from the judgment of the learned Judges of the High Court that if they had been satisfied that the whole of the Rs. 38,400 paid out of the sale proceeds was paid in discharge of debts incurred before the negotiation of sale, they would have been of opinion that the sale ought to have been upheld. With this conclusion their Lordships agree, but they are of opinion that undue importance was attached by the learned Judges to the question whether some of the payments were made in discharge of debts incurred in the interval between the negotiation of the sale and the execution of the sale deed. Even if there had been no joint family business, proof that the property had been sold for Rs. 43,500 to satisfy pre-existing debts to the amount of Rs. 38,000 would have been enough to support the sale without showing how the balance had been applied, as held by their Lordships in the recent case of *Sri Kishan Das v. Nathu Ram* (1).

Where there is a joint family business, the manager, as already pointed out, has authority to raise money not only for the payment of debt, but also for the purpose of carrying on the business. The learned Judges of the High Court were of opinion that, as in this case the business had recently resulted in loss, the managing member was not justified in putting more money into it, and that in any case he should have raised money by mortgage instead of by sale. As regards the latter question, it is not clear that borrowing, probably at a high rate of interest, would have been more beneficial than sale. In any case this was a question for the manager to decide. It was equally a question for the manager whether it would be better to raise more money or to close down the business and it would, in their Lordships' opinion, be unreasonable to require a lender or purchaser to go into questions of this kind, as to which he would rarely be in a position to form a sound opinion. In

the present case the decision to raise more money would seem to have been a wise one, as the business afterwards earned profits with which more lands were purchased.

That, however, is immaterial. In their Lordships' opinion it is established that the money realized by the sale was required for the purpose of paying the debts and carrying on the business, and that the sale was therefore justified. Their Lordships are therefore of opinion that the appeal should be allowed and the decree of the District Judge restored and that the respondents should pay the costs in the Courts below and of this appeal; and they will humbly advise His Majesty accordingly.

D.D.

Appeal allowed.

Solicitors for Appellants—*T. L. Wilson & Co.*

Solicitors for Respondents—*Ranken, Ford & Chester.*

**** A. I. R. 1927 Privy Council 123**

(From Allahabad)

11th March 1927

VISCOUNT DUNEDIN, LORD SALVESEN
AND SIR JOHN WALLIS

Mahant Rai and others—Appellants.

v.

Mt. Lachhmina Kunwar and another—Respondents.

Privy Council Appeal No. 58 of 1925 :
Allahabad Appeal No. 4 of 1923.

**** (a) Gift—Condition to pay maintenance allowance to donor by donee not observed by donee—Property gifted can be recovered by donor.**

Plaintiff conveyed to the defendants by a registered deed of gift certain zamindari lands subject to the payment of a maintenance allowance of Rs. 2,000 a year for the benefit of himself, of his two stepmothers and of his wife and subject to the condition that on failure to pay the allowance the deed should become null and void. It was found that the condition as regards the payment of Rs. 2,000 annually was never complied with and that the defendants had no justification for withholding it.

Held: that plaintiff is entitled to possession of the property gifted.

[P. 124, C. 1, 2; P. 127, C. 2]

**** (b) Civil P. C., O. 32, R. 15—A zamindar renouncing world and neglecting worldly affairs—He is not thereby incapable of protecting his**

(1) A. I. R. 1927 P. C. 37=54 I. A. 79 (P. C.).

interest within R. 15—But delusions of being haunted by demons, persecution by imaginary voices, etc., would justify a contrary inference.

The fact that a person of high position had renounced the world and become a sanyasi, devoting himself wholly to spiritual things and entirely neglecting his worldly affairs, would not of itself, however unusual such conduct might be in a man of high position of a zamindar possessing considerable landed property, justify the Court in holding that by reason of unsoundness of mind or mental infirmity he was incapable of protecting his interests, when suing or being sued within R. 15. But a persistent delusion of being haunted by demons, of persecution by imaginary voices attributed to gases issuing from various parts of his body and the religious megalomania which led him to regard himself as destined to be in some sort, a saviour of the world, are symptoms which would justify the conclusion that the person is suffering from systematic delusional insanity and incapable of managing his own affairs.

[P 126 C 1 ; P 127 C 1]

* (c) *Civil P. C., O. 41, R. 27—Statements of witness in proceedings under Lunacy Act, commenced after dismissal of suit between same parties, were admitted at appellate stage—Evidence Act, S. 33.*

Suit by 2nd plaintiff on behalf of himself and as next friend of 1st plaintiff was dismissed on the ground that 1st plaintiff was not proved to be insane and thus 2nd plaintiff could not sue as next friend and that 2nd plaintiff had no right to sue. After dismissal, 2nd plaintiff began proceedings under Lunacy Act and succeeded in having 1st plaintiff declared insane on the strength of statement of a medical witness of high position. In appeal from the dismissal of the suit, an application was made by the plaintiffs that the evidence and certificates of the medical witness should be admitted as evidence and made part of the record, more especially as the Subordinate Judge had stated that he was not quite satisfied with the medical evidence of another medical man examined in lower Court.

Held: that a case had been made out for taking the evidence of the witness, and he having been cross-examined at great length by the defendants in the lunacy proceedings, it was not necessary to call him again but that his certificates and deposition would be admitted as evidence in this case. —[P 126 C 2 ; P 127 C 1]

A. M. Dunne and B. Dube—for Appellants.

L. DeGruyther and K. Brown — for Respondents.

Sir John Wallis.—This is an appeal from a decree of the High Court at Allahabad, reversing the decree of the Subordinate Judge of Ghazipur in O. S. 210 of 1919, a suit instituted on the 7th November 1919 to recover possession of certain zamindari lands which had been conveyed by Rudra Deo Narain Rai, the first plaintiff, to the defendants by a registered deed of gift dated the 18th

December 1909, subject to the payment of a maintenance allowance of Rs. 2,000 a year for the benefit of the first plaintiff himself, of his two stepmothers, one of whom was the second plaintiff, and of his wife, the third plaintiff, and subject to the condition that on any failure to pay the allowance the deed should become null and void.

Alleging that the first plaintiff was insane at the date of suit, the second plaintiff, one of his step-mothers, sued in his name as his next friend as well as on her own behalf, and his wife also joined as third plaintiff. The plaintiff alleged that the defendants, who belonged to another branch of the first plaintiff's family, took advantage of his bodily weakness and mental infirmity, and of the fact that he had quarrelled with his wife and daughters and the daughters' husbands, and obtained from him a fictitious deed of gift of the suit lands which was never intended to be operative, and that after the execution of the deed the first plaintiff continued in possession as before. It alleged further that the deed had become void by reason of the defendants' failure to pay the stipulated maintenance allowance, and that in any case the second and third plaintiffs were entitled to recover their shares of the arrears of maintenance which were charged on the suit lands. In their written statement the defendants pleaded that the second plaintiff was not entitled to sue as the next friend of the first plaintiff as he was not insane at the institution of the suit ; they denied that the gift was obtained by improper means or was fictitious or unaccompanied by possession ; they further denied that there had been any breach of the conditions of the deed.

The Subordinate Judge, after recording a finding on the fourth issue that the deed was not wrongly obtained by the defendants from the first plaintiff, held on the third issue that the first plaintiff was not incapable of suing on the date of suit and that accordingly the second plaintiff was not entitled to sue as his next friend. He accordingly dismissed the first plaintiff's suit, and holding that the second and third plaintiffs were not entitled to sue for possession of the suit lands, gave them a decree for arrears of maintenance. On appeal the High Court found that by reason of the first

plaintiff's mental condition, the second plaintiff was entitled to sue as his next friend. They further found that in consequence of the defendants' failure to pay the stipulated maintenance, the first plaintiff was entitled under the terms of the deed to recover the suit lands with mesne profits, and made a decree to that effect.

In dealing with the issues whether the deed was improperly procured from the first plaintiff in 1909, and whether he was insane in November 1919, the date of the institution of the suit, the Subordinate Judge reviewed the whole of the evidence as to the life history of the first plaintiff, and arrived at the conclusion that he was undoubtedly a man of weak intellect and incapable of duly managing his own affairs; but that the medical evidence, which was that of a junior Civil Surgeon who had recently begun to practise was not quite sufficient having regard to his want of experience in this class of cases to justify the Court in accepting his conclusion that the first plaintiff was suffering from delusional insanity at the date of the institution of the suit. He found that the first plaintiff belonged to a wealthy and influential family and was the largest co-sharer in the family property; that he succeeded to the zemindari as a young man on his father's death, but found the management of the zemindari burdensome and was anxious to relinquish it to other members of the family. In 1889 the Maharajah of Dumraon, who had obtained a decree against the family, brought their zemindari lands to sale and purchased them himself. The plaintiff joined with the other co-sharers in a suit to set aside the sale, but in 1893 went over to the other side and allowed the suit to be dismissed as regards himself. He would thereby have permanently lost the lands which are the subject of this suit if the Local Government had not subsequently, in 1908, effected a settlement with the Maharajah of Dumraon under which they purchased the estate and restored it, in January 1908, to the original owners, including the first plaintiff, on easy terms as to the repayment of the purchase money. Shortly afterwards the first plaintiff became involved in quarrels with his family. He had no sons, but two married daughters and their two

husbands, and even the father of one of the husbands, came to live in his house and were encouraged by his wife to go on living there in spite of his objections and in the course of the quarrels the husband's father assaulted him by hitting him on the head with a lathi. In resentment at the treatment he had received he appears to have contemplated transferring his zemindari lands to another branch of the family, and he was further provoked by the application made by members of his family to the revenue authorities in November 1909, that his lands should be transferred to their names as he had become insane. Accordingly, in December 1909, he executed the deed of gift in favour of the defendants which is the subject of the present suit. The family were then advised, wrongly the plaintiff states, to take proceedings in the District Court of Ghazipur under the Lunacy Act. The proceedings were unsuccessful, and the decision of the District Court was affirmed by the High Court on appeal. It appears from the judgment of the High Court in that case that there was evidence that the first plaintiff had refused to take food on the ground that the family had caused it to be spoiled by demons; but in his examination before the Court he explained the refusal as due to its having a bad smell and also to his fear of being poisoned. Dr. Baldeo Rao, the Civil Surgeon of Ghazipur, who gave evidence, deposed that he had treated the first plaintiff for mania in 1908, but that he appeared to have recovered. In the result the High Court affirmed the decision of the District Court, observing that it by no means followed that because a man might have delusions on one or two points he was incapable of managing his own affairs.

In 1912, after the failure of the lunacy proceedings, the first plaintiff went away on pilgrimage and appears to have renounced the world and to have become a Udasi Sadhu, or sanyasi, under the new name of Ankar Das; and, as found by the Subordinate Judge, for six years he led the life of a fakir, depending on gifts of food for his support. He threw off the sacred thread, cut off the tuft of hair usually worn by Hindoos, wore yellowish garments, and observed no distinctions of caste or creed. In 1918 he returned to his family and continued to live the life of an ascetic, and took no steps to recover

either the suit lands or the arrears of maintenance from the defendants. With reference to this part of the evidence their Lordships entirely agree with the Subordinate Judge that the fact that the first plaintiff had renounced the world and become a sanyasi, devoting himself wholly to spiritual things and entirely neglecting his worldly affairs, would not of itself, however unusual such conduct might be in a man of his position, justify the Court in holding that by reason of unsoundness of mind or mental infirmity he was incapable of protecting his interests, when suing or being sued so as to entitle the second plaintiff to sue as his next friend (O. 32, R. 15); but, as will be seen, much more than this was proved in the case.

Before instituting the present suit the first plaintiff's family obtained a certificate dated the 12th October 1919, from Dr. M. K. Sarda, Assistant Civil Surgeon of Ballia, that the first plaintiff, B. Rudra Deo Narain Rai, alias Ankar Das, who had been under his treatment since the 8th September 1919, was suffering from chronic delusional insanity, and that his delusions were such as to render him incapable of managing his own affairs or protecting his interests. In his examination Dr. Sarda deposed that the first plaintiff had complained that he was troubled with gas, which gave a bad smell in the room and abused him in violent language and prevented him from sleeping. He also said that he had asked his relations to get the Civil Surgeon to give him chloroform and cut his throat, and he also asked the witness to do so. He also said that it was his desire to obtain, by means of penance, salvation for all animals from an ant to a cow, that is to say, that they might be freed from re-birth. In cross-examination the witness deposed :

He said the delusions were to extirpate all animals from an ant to a cow. He said it was his buddhichar inspiration to extirpate the animals from an ant to a cow, and that he did not learn it from any book. I would call the plaintiff's insanity a religious insanity.

As to this witness the Subordinate Judge observed that he did not think his evidence quite sufficient, in view of the other circumstances, to declare the first plaintiff a lunatic incapable of managing his own affairs, especially as the witness had only a few years' experience and this was his first case of insanity. The Sub-

ordinate Judge was also influenced by the fact that the plaintiffs had failed to produce the first plaintiff in Court for examination, but had contented themselves with applying during the hearing that the Court should go to Narhi to see the first plaintiff or send a Civil Surgeon to report upon him. But the force of this observation is lessened by the fact that it was found impracticable to procure the attendance of the first plaintiff at the lunacy proceedings which were instituted by the family in the District Court of Ghazipur after the 'dismissal of the first plaintiff's suit, while the appeal to the High Court was pending. In these proceedings they produced a certificate from Lieut.-Col. Overbeck Wright, at the time and for many years previously Superintendent of the Lunatic Asylum at Agra, and author of a treatise on insanity, to which the Subordinate Judge had referred in his judgment. According to this certificate, the first plaintiff was a lunatic and incapable of managing his own affairs and was also liable to be dangerous to himself and others.

He was excited and garrulous, full of exaggerated religious fervour and delusions. He stated that devils had possessed him for forty years and that God had put a penance on him to banish all creatures and destroy the world. He has hallucinations of smell, stating that foul gases emanate from various parts of his body, including his umbilicus and nostrils, and he says these have troubled him for 15 years. He states that God has decreed that his release can only be obtained by his being chloroformed by a doctor sahib and having his head cut off.

The defendants in the present suit appeared in the lunacy proceedings and cross-examined Colonel Overbeck Wright at great length on his certificate and evidence. The District Judge found that his conclusions were not in any way shaken, and by an order dated the 19th January 1922 declared the first plaintiff to be a lunatic incapable of managing his own affairs, and appointed the second plaintiff to be his guardian. No orders, he said, were necessary for the custody of the lunatic, who apparently so far had not been dangerous to anyone and was leading the life of a fakir. At the hearing of the appeal in the present case in the High Court an application was made by the plaintiffs that the evidence and certificates of Lieut.-Col. Overbeck Wright should be admitted as evidence and made part of the record, more especially as the Subordinate Judge had

stated that he was not quite satisfied with the medical evidence of Dr. Sarda. In these circumstances the learned Judges came to the conclusion, in which their Lordships concur, that a case had been made out for taking the evidence of Lieut.-Col. Overbeck Wright, and, as he had already been cross-examined at great length by the defendants in the lunacy proceedings, it was not thought necessary to call him again and his certificates and deposition were accordingly admitted as evidence in this case.

Although Colonel Overbeck Wright did not examine the first plaintiff until nearly two years after the institution of the present suit the learned Judges were of opinion that his certificates and evidence thoroughly corroborated those given in the suit by Dr. Sarda and showed the first plaintiff to have been insane at the date of the institution of the suit. They observed that in all the main outlines the statements made by the first plaintiff in September 1919, and in September 1921, were identical, and that some of the delusions which were manifest in 1919 and persisted in 1921 in an aggravated form were said to have been present in 1910, particularly the haunting by shaitans or demons. With reference to this part of the case their Lordships would observe that the first plaintiff's persecution by imaginary voices which he attributed to gases issuing from various parts of his body and the religious megalomania which led him to regard himself as destined to be in some sort a saviour of the world are symptoms which are familiar in inquiries of this kind; and in their Lordships' opinion the learned Judges were well justified in accepting the medical evidence of an acknowledged expert that in September 1921, the first plaintiff was in an advanced state of systematic delusional insanity and incapable of managing his own affairs, and in coming to the conclusion he had been in this condition long before 1919, when Dr. Sarda examined him and formed the same opinion. Their Lordships have the less hesitation in arriving at this conclusion because they think it probable that the Subordinate Judge would have been of the same opinion if the evidence of Lieut.-Col. Overbeck Wright had been before him.

The suit having been properly constituted, it only remains to deal with the

first plaintiff's claim to recover the suit lands according to the condition of the deed for failure to pay the maintenance allowance. As regards this part of the case the defendants pleaded in para. 9 of the written statement that they never evaded payment of the maintenance allowance, but made payments under the first plaintiff's orders and kept the balance in deposit under his instructions. They also pleaded in para. 12 that the plaintiffs had spent what they liked out of the maintenance allowance and that they held Rs. 11,983-11 in deposit under the instructions of this first plaintiff and had always been ready and willing, and still were, to pay the same. There are concurrent judgments of both the lower Courts rejecting the evidence tendered by the defendants in support of these pleas. The Subordinate Judge found that the defendants had never paid anything to the second and third plaintiffs, and that though they might have paid something to, and incurred certain expenses for, the first plaintiff until he left them in 1912, they paid him nothing afterwards, and that there had been a clear violation of the conditions. The learned Judges on appeal expressed their complete agreement with the learned Subordinate Judge in his estimate of the evidence given to prove the fulfilment of the conditions in the deed, and found further that the condition as regards the payment of Rs. 2,000 annually was never complied with and that the defendants had no justification for withholding it. The first plaintiff having died while the appeal was pending, they gave the third plaintiff, his widow and legal representative, a decree for possession with mesne profits for three years prior to the suit and until delivery of possession. In their Lordships' opinion this was the right decree to make on the findings. Accordingly the appeal fails and should be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

D.D.

Appeal dismissed.

Solicitor for Appellants—*Hy. S. L. Polak.*

Solicitors for Respondents—*T. L. Wilson & Co.*

** A. I. R. 1927 Privy Council 128

(From Calcutta : A. I. R. 1925 Cal. 996)

25th March 1927.

LORDS ATKINSON AND CARSON
SIR JOHN WALLIS AND SIR LANCELOT
SANDERSON

Radha Binode Mandal—Appellant.

v.

Sri Sri Gopal Jiu Thakur and others
—Respondents.

Privy Council Appeal No. 78 of 1925 :
Calcutta Appeals Nos. 12 and 13 of 1924.

* * Civil P. C., S. 11—First suit by shebait for framing a scheme of management against other shebait—Second suit by gods themselves through one member of the dedicator's family against other members for declaration that the properties are debuttar—Second suit is not barred by *res judicata*.

The prior suit was instituted by G and R L. In the plaint the plaintiffs were described as "Sri Sri Iswar Gopal Jiu Thakur's shebait." G and R L were defendants in the subsequent suit. The defendants in the prior suit were the other members of the family, and they included N and R B. The defendants also were described as "Sri Sri Iswar Gopal Jiu Thakur's shebait" and the prayer was that all the properties being debuttar properties of Sri Sri Iswar Gopal Jiu Thakur established by the said Paary Lal Mandal and Moni Mohan Mandal, a scheme may be framed for the preservation, and for the efficient performance of the daily and periodical shebas of Sri Sri Iswar Gopal Jiu Thakur and the festivals, etc."

Subsequent suits were by the plaintiffs : (1) Sri Sri god Gopal Jiu Thakur; and (2) Sri Sri god Shambuth Nath Shib Thakur, represented by the shebait N. R B. was the contesting defendant and the prayer was for a declaration that the properties in suit are owned and possessed by the plaintiff Thakurs as debuttar properties :

Held : that the prior suit was not *res judicata* as regards the subsequent suit because the prior suit was not between the same parties as those in the subsequent suit : 2 I. A. 283, *Applied*.

[P 128 C 2, P 129 C 2]

L. De Gruyther and *K. Brown* — for Appellant.

G. R. Lowndes and *B. Dube* — for Respondents.

Sir Lancelot Sanderson.—These are consolidated appeals against two decrees of a Division Bench of the High Court of Judicature at Fort William in Bengal, dated the 3rd March 1924.

The first decree reversed a decree dated the 9th May 1921, of a learned Subordinate Judge of Alipore, and the second varied a decree of another learned Subordinate Judge of that Court dated the 20th September 1921.

The decree of the 9th May 1921 was made in Suit No. 155 of 1919, and the decree of the 26th September 1921 was made in Suit No. 214 of 1919.

The appellant to His Majesty in Council in both appeals is Radha Binode Mandal.

The Suit 155 of 1919 was instituted on the 26th July 1919, by the plaintiffs (1) Sri Sri god Gopal Jiu Thakur and (2) Sri Sri god Shambuth Nath Shib Thakur—represented by the shebait Narendra Nath Mandal. Radha Binode Mandal is the first defendant and there are 19 other defendants.

The shebait plaintiff, Narendra Nath Mandal and the defendants are all members of the Mandal family of Bawali.

The plaint alleges that the properties described in the schedule attached to the plaint are owned and possessed by the plaintiff Thakurs, and that the property numbered 1 is the residential house of the plaintiff Thakurs, where the plaintiff Thakurs have resided with other Thakurs connected with them, and where the sheba and worship have been performed. The relief claimed in the suit is for a declaration that the properties in suit are owned and possessed by the plaintiff Thakurs as debuttar properties.

At the trial Radha Bindode Mandal was the only contesting defendant, and his case was : first that the suit was barred by reason of *res judicata*, and second that there was no valid dedication of the properties in suit to the idols and that the properties were not debuttar.

The learned Subordinate Judge, who tried the suit, decided both these questions in favour of the defendant Radha Binode Mandal and dismissed the suit with costs.

The plaintiffs appealed to the High Court, and the Division Bench of the High Court, consisting of Chatterji and Cuming, JJ., held that the suit was not barred by reason of *res judicata*, and that the properties mentioned in the schedule to the plaint, except items 14 and 15, were debuttar properties.

The Suit 214 of 1919 was instituted on the 17th September 1919. The plaintiff is Radha Binode Mandal and the defendants are the other members of the family.

The plaint alleges that the 28 plots of property, described in the schedule to the plaint in that suit, are ancestral joint properties of the plaintiff and the

defendants, and that the plaintiff and the defendants are in joint possession thereof.

The plaintiff claims a declaration that he has a two-annas share in the properties mentioned in the schedule, and he asks for a preliminary decree for partition of the properties.

This suit was contested. The learned trial Judge held as follows :

The evidence shows that the disputed properties were the debuttar properties, but, subsequently, in Suit 206 of 1915 it was decided that the properties were not debuttar.

He therefore decided in favour of the plaintiff and made a preliminary decree for partition, and directed a Commissioner to be appointed to effect a partition of the disputed properties.

Certain of the defendants in that suit, including Narendra Nath Mandal, appealed to the High Court, one of the grounds of appeal being that the learned Subordinate Judge should have held that the disputed properties were debuttar.

The appeal was heard by the same learned Judges in the High Court, and they stated that in the other appeal they had held that all the properties mentioned in the schedule to the plaint in Suit 214 of 1919, except properties numbered in that Schedule. 22 and 27, were debuttar properties.

They therefore varied the decree of the learned Subordinate Judge and directed that the plaintiff's suit in respect of items other than Nos. 22 and 27 should be dismissed, and they further ordered that the case should be sent back to the lower Court in order that partition might be effected of Items Nos. 22 and 27, in accordance with the directions contained in their judgment.

Radha Binode Mandal has appealed, as already stated, against the two above-mentioned decrees of the High Court.

The arguments, which were presented to their Lordships, related mainly to the Suit No. 155 of 1919, which was brought by the two above-mentioned gods, through the shebait, Narendra Nath Mandal, against Radha Binode Mandal and others.

It was contended, on behalf of the appellant in the first place, that the question whether there had been a valid dedication of the properties in suit, and whether they were debuttar properties, was *res judicata*, and reliance was

placed upon S. 11 of the Civil P. C. of 1908.

The material facts which it is necessary to state for the consideration of this argument are as follows :

In 1914 a suit, No. 212 of 1914, was instituted by Gopal Lal Mandal, Ram Lal Mandal and six others, against other members of the family, and it was prayed that it might be declared that the properties of Sri Sri Iswar Gopal Jiu Thakur established by the late Peary Lal and Mani Mohan Mandal.

The suit was valued at Rs. 1,87,052.

This suit was withdrawn on the 5th August 1915, with liberty to bring a fresh suit.

On the 24th September 1915, another Suit (No. 206 of 1915) was instituted by Gopal Lal Mandal and Ram Lal Mandal. In the plaint the plaintiffs were described as "Sri Sri Iswar Gopal Jiu Thakur's shebait."

Gopal Lal and Ram Lal Mandal are Defendants Nos. 2 and 3 in the present Suit (No. 155 of 1919.).

The defendants in the 1915 suit, nineteen in number, were the other members of the Mandal family, and they included Narendra Nath Mandal and Radha Binode Mandal.

The defendants also were described as "Sri Sri Iswar Gopal Jiu Thakur's shebait."

The first prayer in the plaint was as follows :

That all the properties, being debuttar properties of Sri Sri Iswar Gopal Jiu Thakur established by the said Peary Lal Mandal and Mani Mohan Mandal, a scheme may be framed for the preservation, management and improvement of the said properties, and for the efficient performance of the daily and periodical shebas of Sri Sri Iswar Gopal Jiu Thakur and the festivals, etc.

There was a further prayer that a manager or trustee should be appointed.

The plaint contained allegations that the Defendant No. 10, viz., Radha Binode Mandal, and certain other defendants, had been putting obstacles in the way of the collection of rents and of the management of the properties, and that on account of difference of opinion among the shebait it had become very difficult to manage the debuttar estate properly, to collect rents and to perform the deb-sheba, etc., in a proper way.

Radha Binode Mandal (Defendant No. 10 in the 1915 suit) denied that the properties were debuttar.

Among other issues the following issues were stated in the Court of the learned Subordinate Judge who tried the suit:

(3) Is the suit maintainable in its present form?

(5) Are the properties described in the schedule of the plaint debuttar properties? Was there any valid arpannama or dedication of the same to the Thakur Sri Sri Gopal Jiu?

On the third issue, the learned Subordinate Judge held that the frame of the suit was defective. He was of opinion that the plaintiffs should have directly prayed for a declaration that the properties of the plaint were dedicated debuttar properties.

He pointed out that in the previous suit (viz., the 1914 suit) such a prayer was made: that the Court called for ad valorem Court-fee on the value of the properties; that the plaintiffs in that suit were unwilling to pay such fees, and that the suit was withdrawn.

He came to the conclusion that the 1915 suit had been framed in a slightly different form in respect of practically the same relief, and with a view to avoid the payment of a large amount of Court-fees. He therefore held that the suit was not maintainable as framed.

Although the learned Judge had come to the above-mentioned conclusion, that the suit as framed was not maintainable, he proceeded to consider the fifth issue, and in respect thereof he held that the plaintiffs had failed to prove that the properties were debuttar. This decision was on the 31st July 1916.

There was an appeal by the plaintiffs to the learned District Judge, who held that the plaintiffs had not succeeded in establishing an absolute endowment, and he agreed with the learned Subordinate Judge that the suit was not maintainable in its present form. He said:

The character of the property was a direct issue in the case and the plaintiffs should not have attempted to obtain a decision on this direct issue by bringing a suit in such a form as to avoid the payment of a larger amount in Court-fees.

The appeal accordingly was dismissed with costs. This was on the 19th July 1917.

As already stated, the suit now under consideration, No. 155 of 1919, was instituted on the 26th July 1919.

The seventh issue at the trial of that suit was: "Is the suit barred by the principles of res judicata?"

The learned Subordinate Judge held that the judgment in the suit, No. 206 of 1915, operated as res judicata.

The Division Bench of the High Court came to the conclusion that the decision in the 1915 suit did not operate as res judicata, and the learned Judges stated several reasons for the conclusion at which they arrived.

The above-mentioned reasons were fully debated and considered during the arguments, but their Lordships do not think it necessary to refer to them in detail because, in their Lordships' opinion, this part of the case should be disposed of on one consideration which goes to the root of the matter.

The plaintiffs in the suit which is now under consideration, viz., No. 155 of 1919, are the two gods, Gopal Jiu Thakur and Shambuth Nath Shib Thakur, suing by the Shebait Narendra Nath Mandal.

In their Lordships' opinion these two gods were not parties to the 1915 suit.

It is true that in the 1915 suit the plaintiffs were described as "Sri Sri Iswar Gopal Jiu Thakur's Shebait," and it was argued that the 1915 suit must therefore be regarded as having been brought on behalf of the deity "Gopal Jiu."

Their Lordships, however, are not prepared to accept that argument.

It is to be noted that not only were the plaintiffs described as the shebait of the god, but the defendants also were described in the same way. Therefore, if the god Gopal Jiu were to be regarded as a plaintiff, he must also be regarded as a defendant, which would be a reductio ad absurdum.

For the consideration of this point, however, it is necessary to examine not only the heading of the plaint, but also the allegations therein.

In their Lordships' opinion, the allegations in the plaint show that the 1915 suit was based upon the assumption that the properties were debuttar properties, and that the suit was brought for the purpose of having a scheme framed by the Court for the preservation and management of the properties and for the performance of the daily and periodical shebas.

The suit, it was alleged, had become necessary by reason of the disputes as to the management of the properties between the plaintiffs and some of the

defendants, all of whom were alleged to be shebaita of the god, and it was apparently not thought necessary to make the two gods, the plaintiffs in the present suit, parties to the 1915 suit.

In their Lordships' opinion the description of the plaintiffs and the defendants in the 1915 suit as shebaita of the Thakur, and the nature of the suit, as disclosed by the allegations in the plaint, are not sufficient to constitute the 1915 suit a suit by or on behalf of the gods, who are the plaintiffs in the present suit, viz., No. 155 of 1919.

The result, therefore, in their Lordships' opinion, is that the suit of 1915 was not between the same parties as the parties in the suit now before the Board; the case, therefore, does not fall within S. 11 of the Code of Civil Procedure, 1908, or within the statement of the general law made in *Krishna Behari Roy v. Bunwari Lal Roy* (1).

For the above-mentioned reason, their Lordships are of opinion that the conclusion, at which the learned Judges of the High Court arrived on the issue of res judicata, was correct.

They desire to guard themselves by saying that they must not be taken as adopting the grounds upon which the decision of the High Court was based. They express no opinion on any ground other than that which has been hereinbefore dealt with.

Secondly, it was argued on behalf of the appellant that the decision of the learned Judges of the High Court as to the character of the properties in suit was wrong.

Their Lordships had the advantage of a very careful and elaborate examination of the documents and evidence presented to them by the learned counsel who appeared on behalf of the appellants.

They have the further advantage of a judgment of the High Court, which is conspicuous for the care with which it was obviously prepared. All the material points, which were urged by the learned counsel for the appellant, were referred to and considered by the learned Judges of the High Court, and no fault could be found with the accurate statement of the facts and evidence in relation to such matters.

In their Lordships' opinion, there is

(1) [1875] 1 Cal. 144=2 I. A. 283=25 W. R. 1=3 Suther. 213=3 Sar. 559 (P. C.).

only one question on this part of the case, viz., whether the learned Judges were justified in drawing the inference from the evidence, to which they referred, that the properties described in the schedule, with the exception of two items, were debuttar properties.

Their Lordships, having come to a clear conclusion during the course of the argument, did not think it necessary to call upon the learned counsel for the respondents for an answer on this part of the case.

In their Lordships' opinion, there was ample evidence in the case to justify the inference which the learned Judges drew as to the character of the properties.

Their Lordships, therefore, are of opinion that the appeal of Radha Binode Mandal against the decree of the High Court in the Suit No. 155 of 1919 fails. It follows as a necessary consequence of the findings of the High Court being upheld, that the appeal of Radha Binode Mandal against the decree of the High Court in Suit No. 214 of 1919 also must fail.

Their Lordships, therefore, are of opinion that both the appeals should be dismissed with costs, and they will humbly advise His Majesty accordingly.

D.D. *Appeals dismissed.*

Solicitors for Appellant—*T. L. Wilson & Co.*

Solicitors for Respondents—*Watkins & Hunter.*

* * A. I. R. 1927 Privy Council 131

(From Madras)

21st March 1927

LORDS PHILLIMORE, CARSON AND
DARLING AND MR. AMEER ALI.

Vibhudapriya Thirtha Swamiar—
Appellant.

v.

Lakshmindra Thirtha Swamiar—Res-
pondent.

Privy Council Appeal No. 54 of 1924.

* * (a) *Hindu Law—Religious endowment—Mutt—Head of—Money borrowed for feeding brahmins in accordance with custom and rebuilding dilapidated structures of the Mutt for necessity.*

Money borrowed by the head of a Mutt to perform the necessary duties relating to the Mutt, including feeding as many Brahmins as

attend a particular festival lasting for a period of two years and rebuilding a dining hall which was falling to pieces and was directed by Government to be repaired, is for necessary purposes and is binding on the Mutt: 40 *Mad.* 709 (P. C.), *Expl.* [P 133 C 2, P 134 C 1]

* (b) *Civil P. C., O. 40, R. 1 — Large debts contracted by a Mutt—Income not sufficient to meet expenses and also to pay off debts—Receiver was appointed.*

Where the income of a mutt (religious endowment) was not sufficient both to meet the expenses and to pay off debts contracted by its head, a receiver was directed to be appointed: *A. I. R. 1926 P. C. 112, Ref.* [P 131 C 2]

G. R. Lowndes and K. V. L. Narasimham—for Appellant.

A. M. Dunne and B. Dube — for Respondent.

Mr. Ameer Ali.—The appellant in this case is the Matadhipathi or superior of the Adinar Mutt at Udipi in the South Kanara District, and he sues the defendant, the present Matadhipathi of another institution called the Sirur Mutt (in the same town) for certain moneys which he alleges are due to him by the defendant's predecessor in office. The defendant is a minor and defends this action by his father as guardian.

The plaintiff alleges that the predecessor of the defendant borrowed the money for the purposes of the Mutt, and the transactions ranged over a long period from 1902 until about the time of his death in 1916; that a settlement of account was arrived at on the 14th August in that year and an acknowledgment was signed by the deceased Matadhipathi (Exh. C. on the record).

The Sirur Matadhipathi died on the 27th September 1916, and the plaintiff brought his suit against his successor on the 14th August, 1919. It should be mentioned that as the deceased Matadhipathi had made no nomination in his lifetime the superior of the connected Sodi Mutt appointed the defendant as his successor.

The plaintiff's claim was denied on behalf of the defendant; the acknowledgment (Ex. C.) was charged to be a forgery, and it was further contended that even if the debts were genuine the assets of the Mutt were not liable for the money borrowed by the deceased Swami.

The case went to trial before the Subordinate Judge of South Kanara who held that the impugned transactions were true, and that Ex. C. was genuine,

and that the debts were contracted by the deceased Matadhipathi for legitimate purposes, and that the Mutt assets were liable for their satisfaction. He accordingly decreed the plaintiff's claim.

From his decree there was an appeal to the High Court of Madras, which differing from the trial Judge dismissed the plaintiff's suit, in so far as it sought to make the assets of the Mutt answerable for the debt. The learned Judges held in substance that the plaintiff had failed to show that the debts for which the suit was brought were contracted for necessary purposes and that consequently the Mutt was not liable. They, however, decreed the claim in regard to the personal assets of the deceased that had come into the defendant's hand.

The plaintiff has appealed from the decree of the High Court to His Majesty in Council and the main question for decision is with regard to the liability of the Mutt assets for the satisfaction of his debt.

It is in evidence that in the town of Udipi there are eight mutts each presided over by a superior or swamiar. They appear to form 4 groups connected by a tie which permits in case of the superior of one mutt dying without nominating a successor the superior of the other mutt to appoint a successor to the deceased swamiar.

Besides these mutts there is a temple dedicated to Krishna, one of the manifestations of Vishnu, perhaps the most popular deity forming the Hindu Triad. Admittedly it has no superior but the affairs of the Krishna temple are managed by the superiors of the eight Mutts in turn.

The important ceremonies connected with the temple of Krishna are performed during the Pariyaya which lasts from the 15th January in one year to the middle of January two years later. During this period the superior of the Mutt whose turn it is, usually called the Pariyaya Swami, has absolute power over the performance of the rites and ceremonies.

The South Kanara Manual, published under the authority of Government, contains the following description regarding these mutts:

The temple of Krishna, at Udipi, is said to have been founded by Madhavacharya himself who set up in it the image of Krishna origi-

nally made by Arjuna and miraculously obtained from a vessel wrecked on the coast of Tuluva. Besides the temple at Udipi he established eight 'Mathas' or sacred houses, each presided over by a sanyasi or swami. These exist to this day each swami in turn presides over the temple of Krishna for a period of two years and spends the intervening fourteen years touring throughout Canara and the adjacent parts of Mysore levying contributions from the faithful for the expenses of his next two years of office, which are very heavy as he has to defray not only the expenses of the public worship and of the temple and Matha establishments, but must also feed every Brahmin who comes to the place.

Madhvacharya, who was born in the 12th century of the Christian era, is credited with introducing vaishnavism cult or the Krishna cult in Southern India.

The evidence in this case fully accords with the description in the Manual.

The plaintiff in support of his claim examined besides himself a number of witnesses on whom the Subordinate Judge relied. Among them is an old servant of the Sirur Mutt who had been in service for 25 to 30 years. He speaks to the rebuilding of the Dining Hall which had become dilapidated and to the expenses connected with the Pariyaya.

Another witness is the superior of one of the other Mutts in Udipi, Sudindra Thirtha, who speaks as follows:

I am one of the Swamis of the eight Mutts at Udipi. There is a custom that these eight Mutts should perform Pariyaya in the Shri Krishna Mutt . . . The Swami of each of the eight Mutts should perform Pariyaya for a period according to turn. The said custom of performing Pariyaya prevails from the date of Madhwacharya. Provisions have to be kept ready for the Pariyaya. Rice has to be stored. This storing commences from about a year before the Pariyaya.

After stating the quantities of provisions to be stored for the festival he describes in the following terms the expenses he himself incurred whilst he was in charge of the Pariyaya.

I have performed two Pariyayas. My second Pariyaya was from 17th January, 1912, to 16th January, 1914. I have incurred a debt of Rs. 30,000 during the said Pariyaya period. It was a debt contracted to conduct the Pariyaya. The Pariyaya of the Sirur Mutt commences after the Pariyaya of my Mutt is over. A debt of Rs. 25,000 was contracted during my first Pariyaya. I knew Lakshmi Samudra Thirtha Swami (the deceased superior) was not extravagant but was very frugal in expenditure. My Mutt has an income of about Rs. 10,000 per annum excluding assessment. The Mutt of Krishna has an annual income of about 500 munsas of rice and Rs 500 in cash from lands. Besides this it gets a total tasdik of Rs. 13,000

per annum from the British Government and Mysore State. The Swami of the Pariyaya Mutt has to meet the rest of the expenditure either from the accumulations of the income already made or by borrowing funds. During the Pariyaya period of 2 years offerings by devotees or pilgrims may amount to Rs. 25,000. But Rs. 12,000 have to be spent out of it for making presents to them. It is not possible to meet the expenditure of the Pariyaya period from the income of the above-mentioned Mutt of Shri Krishna, i. e., tasdik, income from lands, and offerings from devotees and pilgrims. At the Pariyaya festival about 10,000 persons are fed per day.

The plaintiff himself, who is the superior of the Admar Mutt, speaks thus of the heavy expenses incurred in performing the worship and the attendant ceremonies.

The aforesaid sums were borrowed by the late Sirur Swami for the expenses of his Pariyaya. Udipi Krishna temple has lands and also gets tasdik and these are got by the Pariyaya Swami for the time being. Those incomes are not sufficient for the expenses of the Pariyaya. The Pariyaya Swami also gets kanikas (offerings or presents) from votaries and pilgrims during the Pariyaya period. The income of the Mutt of the Pariyaya Swami is also utilized for the Pariyaya expenses. All these incomes are not sufficient to meet the expenses of the Pariyaya. The Pariyaya Swami before his turn of Pariyaya commences has to store articles, viz., rice, firewood and other provisions and also to grow plantain plantations. For all these, the income of the Krishna temple is not available. I have heard that Sirur Mutt has an income of about Rs. 16,000 a year. As the income of the Sirur Mutt and that of the Krishna temple and also the offerings of the votaries were not sufficient for the Pariyaya expenses, the late Sirur Swami had to incur debts. The Bhojanasala (Dining Hall) constructed by the late Sirur Swami would cost about Rs. 20,000.

In the Manual there is a further reference to the Pariyaya:

The periodical change of the Swami presiding over the temple of Krishna is the occasion of a great festival known as the Pariyaya when Udipi is filled to overflowing by a large concourse of Madhvas not only from the district but from more distant parts, especially from the Mysore territory.

Mr. Justice Krishnan in his judgment in the case remarks:

there are no doubt certain poojas and ceremonies which have necessarily to be performed and any reasonable expenditure incurred for carrying them out will be binding on the Mutt. But there is no obligation to have the ceremonies performed on the scale that the Sirur Swami did.

It is admitted that no scale of expenditure is fixed for the performance of the ceremonies beyond recognized custom and usage. They have to be performed according to the practice which has prevailed for centuries. The Dining

Hall was falling to pieces, and the Government appears to have intimated to the superior that unless it was rebuilt and put in proper order its contribution would be withdrawn. It is in evidence that in executing the necessary repairs considerable cost was incurred. It can hardly be said that the expenditure for these purposes was not legitimate.

According to Mr. Justice Ramesam, the second Judge, the necessity for the debt in order to bind the Mutt must be "justifiable." He says:

It is idle to pretend that the feeding could have gone on anything like this scale in all the six centuries during which these Mutts existed or even in the earlier years of the last century.

Referring to the case of *Palaniappa Chetty v. Sreemath Devashamony Pandara Sannadhi* (1), the learned Judge observes:

It would be an instance of the misapplication of the word 'custom' and of forgetfulness of essentials of a custom which modifies the ordinary law to say that the Mutts are bound by custom to feed every Brahmin that comes to the Pariyaya (as is stated in the South Kanara Manual). The numbers may increase as the years roll on and the result of carrying out the idea of feeding every one that comes may be the destruction of the institutions themselves. The Swamis have a wide power over their income and Courts do not ordinarily scrutinise their manner of exercising it so long as they do not seek to bind their successors. If a successor is sought to be bound the borrowing must be for justifiable necessity.

The learned Judge seems to have misapprehended the effect of their Lordship's judgment in *Palaniappa Chetty's* case (1). In that case one head of a Mutt had purported to alienate in perpetuity certain lands of the institution; and the impugned alienation was attempted to be supported by an alleged custom. The remarks of the Board relate to this contention; they lay down no general rule.

He seems also to have overlooked the fact that the facilities for travelling afforded by the present conditions of the country materially account for the larger influx of pilgrims and worshippers, without imputing blame or dereliction of duty to the Swami. As pointed out in the case of *Vidya Varuthi Thirtha v. Balusami Ayyar* (2), these superiors have ample discretion in the application of the funds of the Mutts, but always subject to

certain obligations and duties equally governed by custom or usage.

In the South Kanara Manual, also, there is an account of the vast concourse that flocks to the temple of Krishna on the recurring pariyaya and the duty sanctioned by ancient practice, which rests on the superior in charge.

These Matadhipathis have a difficult task to exercise control over the numbers of pilgrims, who come to the temple in order to participate in the festivals and share in the food offerings. Even if it were permissible for the superior to exclude a certain number from being fed, their Lordships doubt whether popular sentiment would sanction his so doing. The obligations under which they labour are regulated by custom, which are of long standing and have been observed for centuries.

What their Lordships have to see in this case is, firstly, whether the debts were contracted by the deceased Swami for his own purposes or for the purposes of the temple and in discharge of the duties under which he lay in the performance of the worship and the feeding of pilgrims; and, secondly, whether the monies so borrowed were legitimately applied for those purposes.

In *Niladri Sahu v. Chaturbhuj Das* (3), the superior of a Mutt desirous of improving the houses for the lodgment of Rajahs and other rich devotees who visited his Mutt for the purpose of worship, built fitting habitations for them and attached the same to his institution. It was found that the revenue of the Mutt, although sufficient to meet the ordinary expenses of the worship, was insufficient to defray the cost of the construction, maintenance and management of these new buildings.

The superior accordingly began to borrow, from time to time, from money-lenders various sums of money to pay for these constructions. It was also found that the borrowed money was applied partly to the performance of the necessary worship; and that the Mutt was making use of the buildings constructed by the superior. The Board directed the appointment of a receiver in respect of the usufruct, which ordinarily went to the superior to apply the same for the payment of the debts contracted by him.

(1) [1917] 40 Mad. 709=39 I. C. 722=44 I. A. 147 (P. C.).

(2) A. I. R. 1922 P. C. 123=48 I. A. 302 (P. C.).

(3) A. I. R. 1926 P. C. 112=53 I. A. 253 (P. C.).

Their Lordships think that the proper course to take in the present case should be the same, viz., to remit the case to the High Court, to send it down to the Subordinate Judge with the following directions: that in case the guardian of the defendant does not pay within three months from the arrival of the record the sum sued for, plus interest at the contractual rate until payment, the trial Court should appoint a receiver for the rents and issues of the Mutt property and the proceeds from offerings, etc., and after payment of all expenses connected with the Mutt and the performance of the ceremonies and festivals and a reasonable provision for the maintenance of the Matadhipathi, the balance should be applied in discharge of the plaintiff's debt until such debt has been paid off. The order of the High Court will be discharged.

The appellant is entitled to his costs in all the Courts, and their Lordships will humbly advise His Majesty accordingly.

D.D.

Case remitted.

Solicitors for Appellant — Chapman, Walker & Shephard.

Solicitor for Respondent—Hy. S. L. Polak.

A. I. R. 1927 Privy Council 135

(From Calcutta: A. I. R. 1926 Cal. 97)

21st March 1927

LORDS PHILLMORE AND DARLING,
MR. AMEER ALI AND SIR LANCELOT
SANDERSON.

Narayan Das Khetry—Appellant.

v.

Jatindra Nath Roy Chowdhry and
others—Respondents.

Privy Council Appeal No. 41 of 1926
Calcutta Appeal No. 53 of 1925.

(a) Bengal Land Revenue Sales Act. (11 of 1859) S. 3—Land sold under the Act—Land entered in the register passes to auction purchaser but not the buildings standing thereon.

On the failure of an owner to pay the Government assessment, his estate or interest in the land is forfeited or rather determined. By a sale held under Act 11 of 1859 what is sold is not the interest of the defaulting owner, but the interest of the Crown, Subject to the payment of the Government assessment. 18 C. W. N. 1281 P. C. Applied.

[P 137 C 1]

The word "estate" within the Act must be taken to have a more limited meaning than it would have in English law and the government's power of sale for arrears of revenue prima facie is limited to the land, which is subject to the payment to the Government of the annual revenue and in respect of which the proprietor is entered in General Register of Revenue-paying Estates.

Where land is sold under Act 11 of 1859 it is the land so entered in the register which passes under the sale to the auction purchaser but not the buildings on the land. A. I. R. 1926 Cal. 97 affirmed. [P 137 C 2]

It seems that in order to make a house erected upon the land as well as the land itself subject to the Government power of sale for arrears of revenue special words indicating the intention of the Legislature to make the building subject to sale would be necessary. [P 137 C 1 P 137 C 1]

*(b) *Maxims*—Whatever is affixed or built on land become part of it has a limited application in India.

The maxim which is found in English law, viz. "quicquid plantatur solo, solo cedit", has at the most only a limited application in India. There is nothing in the laws or Customs of India, to show any traces of the existence of any absolute Rule of Law that whatever is affixed or built on the soil becomes a part of it and is subjected to the same rights of property as the soil itself. [P 137 C 2]

*(c) *Land Acquisition Act*, Ss. 29 and 30—Land and buildings thereon owned separately—Principles of apportionment discussed.

The matters to be considered when land acquired and the buildings standing thereon are owned separately are (1) right of the owner of land to call upon the owner of buildings to remove the house. If the latter did remove the house, the value to him would be small, and in the ordinary course would be no more than what has been called "demolition value" viz the value of the materials less the cost of removal; and if he did not remove the house he would lose it; (2) the possibility that (if the land had not been acquired under the Land Acquisition Act) the owner of the land would not have desired or required the removal of the house and might have been willing to pay to owners of the house, more than the mere demolition value of the house. In other words, the owner of the land would be possible purchaser who might be willing to give more for the house than anyone else as he was the owner of the land. (3) If the house owner were called upon to remove the house he would be entitled to a reasonable time for such removal and that during such time the land owner would be kept out of enjoyment of the land.

[P 133 C 2]

G. R. Lowndes and B. Dube—for Appellant.

A. M. Dunne and K. Brown—for Respondents

Sir Lancelot Sanderson.—This is the plaintiff's appeal against the decision of a Division Bench of the High Court of Judicature at Fort William in Bengal, given on the 12th March, 1925, which reversed a judgment and decree dated

24th August 1922, of the learned Subordinate Judge of the 24 Perganas.

The material facts are as follows;—

Satyendra Nath Roy, who was the predecessor of the defendant, was the proprietor of the holding in question.

The holding was sold in December, 1919, under the provisions of Act XI of 1859 for arrears of the Government Revenue of Rs. 2 annas 8 and pie 1.

The plaintiff purchased the holding at the sale for the sum of Rs. 2,900. Application was made to the Divisional Commissioner by the defendants or their predecessor to have the sale set aside, but the application was refused.

On the 5th July, 1920, a sale certificate was issued to the plaintiff by the Collector of the 24 Perganas, certifying that the plaintiff had purchased, under Act 11 of 1859, the mahal, which was specified in the certificate and which was situate in the Touzi of the district of 24 Perganas. It appears from the copy of the certificate which is before their Lordships that it was therein stated that the purchase took effect on the 1st May 1919. At the hearing of the appeal by their Lordships there was a dispute as to the correctness of the last-mentioned date. Walmsley, J., in his judgment referred to this date as the 1st May, 1920, while Mukherji, J., referred to the 1st May 1919. If it becomes necessary to ascertain the correct date a reference will be necessary for that purpose. On the 2nd August, 1920, a declaration was made under the provisions of the Land Acquisition Act, viz., Act 1 of 1894, in respect of the holding and on the 11th March, 1921, the Deputy Collector made his award. The total amount of the award was Rs. 14,569 (omitting annas and pies.) The sum awarded in respect of the land and trees, and the additional compensation under S. 23 (2) was Rs. 2,181, and the amount in respect of "Structures" and the additional compensation was Rs. 12,388. The structure consisted of a residential house which has been erected by Satyendra Nath Roy, and it was standing on the land at the time of the plaintiff's purchase. The plaintiff's name had been registered under Act VII of 1876 (B. C.), and he claimed the whole amount of the compensation money, viz., Rs. 14,569. The Collector decided that it was necessary for the plaintiff to produce an order of

a competent Court before the money could be paid to him.

Accordingly, the plaintiff instituted the present suit, in which he claimed that his right title and interest to the holding in question and to the whole of the compensation money should be established and declared. He prayed for a further declaration that he was entitled to withdraw the compensation money deposited in the Alipore Collectorate. It was urged on behalf of the defendants in the trial Court that the sale was not valid or binding on them. The learned Subordinate Judge found against the defendants on this issue, and this finding was not disputed in the High Court or on the appeal to this Board. Assuming the sale to be valid, it was not disputed that the plaintiff was entitled to the compensation money awarded in respect of the land and trees. It was, however, urged on behalf of the defendants that the plaintiff had not acquired any title to the building on the land by his purchase at the above-mentioned sale, and consequently that he was not entitled to any of the compensation money awarded in respect thereof.

The learned Subordinate Judge held that the building on the land passed with the holding to the auction purchaser (i. e., the plaintiff) by the revenue sale, and that the plaintiff was entitled to recover the entire compensation money. On appeal to the High Court, the learned Judges held that the ownership of the building did not pass to the plaintiff on the above-mentioned sale, but that the defendants remained the proprietors thereof. The learned Judges then proceeded to the consideration of the question whether the defendants were entitled to the whole of the compensation money awarded in respect of the building, and for the reasons set out in the judgments of the learned Judges they decided that the defendants were entitled to the whole amount awarded for the building, less a sum of Rs. 2,300. The sum of Rs. 2,300 was awarded by the learned Judges as compensation to the plaintiff at the rate of Rs. 100 per month in respect of 23 months, which period was calculated from the 1st May 1919, to the 11th March 1921, when the Collector took possession of the premises.

From this decision the plaintiff has appealed. The first question is whether the learned Judges of the High Court were right in holding that the title to the building did not pass to the plaintiff by reason of his purchase at the revenue auction sale.

It was not disputed that if the plaintiff's case was based upon a conveyance by the late proprietor of the land, the house would pass with the land to the purchaser; but it was argued on behalf of the defendants that as the sale in question was under the Act 11 of 1859 it was merely a sale by the Collector of the Government's interest. This part of the defendants' contention is, in their Lordships' opinion, correct; for in *Surja Kanta Acharjya Bahadur v. Sarat Chandra Roy Chaudhuri* (1) the Judicial Committee held that on the failure of an owner to pay the Government assessment, his estate or interest in the land is forfeited or rather determined and that by a sale held under Act 11 of 1859, what was sold was not the interest of the defaulting owner, but the interest of the Crown, subject to the payment of the Government assessment. It is therefore necessary to ascertain what was the interest of the Crown which was subject to the Government assessment.

The preamble to Act 11 of 1859 recites that it is desirable, among other things, to improve the law relating to sales of land for arrears of revenue in the provinces of Bengal, Behar and Orissa. S. 3 provides for the sale of the "estate in arrear" in the payment of revenue at public auction to the highest bidder. There is no definition of the word "estates" in the 1859 Act, but in the Bengal Act 7 of 1868, which is to be read with and taken as part of the said Act of 1859, provision is made that in that Act and the Act 11 of 1859 the word "estate" means any land or share in land subject to the payment to the Government of an annual sum in respect of which the name of proprietor is entered on the Register known as the General Register of all Revenue paying Estates, or in respect of which a separate account may, in pursuance of S. 10 or S. 11 of the said Act 11 of 1859, have been opened.

(1) [1914] 18 C. W. N. 1281=25 I. C. 309=20 C. L. J. 563 (P. C.).

It was argued on behalf of the defendants that it was the land so entered on the register, and not the building on the land, which was subject to the payment of the Government revenue and which passed to the purchaser at the auction sale held under the provisions Act 11 of 1859. The property in question lies in the 24 Perganas, outside the boundaries of Calcutta, and it was conceded that the maxim, which is found in English law, viz., "quicquid plantatur solo, solo cedit," has at the most only a limited application in India.

The case of *Thakur Chandra Poramanick v. Ram Dhone Bhattacharju* (2), to which reference was made in the High Court's judgment, differs materially from the present case in its facts, and the decision itself is not applicable.

The following statement, however, is to be found in the judgment of the Full Bench which was delivered in 1866:

We have not been able to find in the Laws or Customs of this country any traces of the existence of an absolute Rule of Law that whatever is affixed or built on the soil becomes a part of it, and is subjected to the same rights of property as the soil itself.

Their Lordships, therefore, are of opinion that in construing the provisions of the above-mentioned Acts it is necessary to bear in mind the statement made by Sir Barnes Peacock in the above-mentioned case which seems to have been accepted for many years as a correct pronouncement.

This being so, the word "estate" must be taken to have a more limited meaning than it would have in English law and the Government's power of sale for arrears of revenue prima facie is limited to the land, which is subject to the payment to the Government of the annual revenue, and in respect of which the proprietor is entered in the General Register of Revenue-paying Estates, and having special regard to the view held in India respecting the separation of the ownership of buildings from the ownership of the land, and to the recognition by the Courts in India that there is no rule of law that whatever is affixed or built on the soil becomes a part of it, and is subjected to the same rights of property as the soil itself, their Lordships are of opinion that in order to make a house erected upon the land, as well as the land itself, subject to the Govern-

(2) 6 W. R. 228.

ment power of sale for arrears of revenue special words indicating the intention of the Legislature to make the building subject to sale would be necessary.

No such special words are to be found, and their Lordships are of opinion that the conclusion at which the learned Judges of the High Court arrived, viz., that the ownership of the building did not pass to the plaintiff by reason of the revenue sale was correct, although they are not prepared to adopt all the reasons which were advanced for that conclusion.

The question then arises whether the defendants are entitled to the compensation money which was awarded in respect of the building, or to what, if any, portion of such money. Their Lordships are not prepared to adopt the basis on which the learned Judges of the High Court acted in this respect. Their Lordships are of opinion that, in order to arrive at a decision on this part of the case, it is necessary to consider what would have been the position and the respective rights of the parties after the sale, if no acquisition had taken place under the Land Acquisition Act. In such a case it would be reasonable that the parties should arrive at an arrangement as to what should be done, and their Lordships, therefore, suggested that learned counsel appearing for the appellant and respondents should enquire whether any arrangement could be made. Their Lordships have been informed that it has not been found possible to arrive at any arrangement or to agree upon a sum to be paid to the defendants, and their Lordships have, therefore, to deal with this part of the case.

It is difficult to lay down any principle upon which the compensation money awarded in respect of the house should be apportioned, but the position seems to their Lordships to involve certain matters which should be taken into consideration by the Court which makes the apportionment.

After the sale the plaintiff would have been the owner of the land and the defendants would have been the owners of the house. The plaintiff would have had the right to call upon the defendants to remove the house. If the defendants did remove the house, the value to them would be small, and in the ordinary course would be no more than what has

been called "demolition value," viz., the value of the materials less the cost of removal; and if the defendants did not remove the house they would lose it. There is, however, the possibility that (if the land had not been acquired under the Land Acquisition Act) the owner of the land would not have desired or required the removal of the house, and he might have been willing to pay to the defendants, the owners of the house, more than the mere demolition value of the house. In other words, the owner of the land would be a possible purchaser, who might be willing to give more for the house than anyone else, as he was the owner of the land. It is also to be remembered and taken into consideration that if the defendants were called upon to remove the house they would be entitled to a reasonable time for such removal, and that during such time the plaintiff would be kept out of enjoyment of the land.

All the above-mentioned matters will have to be taken into consideration in assessing what portion of the compensation money awarded in respect of the house should be paid to the defendants.

Their Lordships are not in a position to make the apportionment, and as the parties have not been able to agree upon an amount, it is necessary to remand the case to the learned Subordinate Judge in order that he may decide to what portion of the Rs. 12,388 the defendants are entitled, having regard to the matters which are mentioned in this judgment.

Their Lordships have been informed that the balance of the compensation money, ordered by the High Court's decree to be refunded, has not yet been refunded.

Their Lordships, therefore, will humbly advise His Majesty that the appeal should be allowed, that the case should be remanded to the learned Subordinate Judge for the abovementioned purpose, and that the decree of the High Court should be varied as follows: That it be declared that out of the total compensation money, i. e., Rs. 14,569-9-6, the plaintiff is entitled to Rs. 2,181-9-2, and such further sum as the learned Subordinate Judge on remand may find due to him in respect of his share of the sum of Rs. 12,388-0-4 awarded by the Collector in respect of the house, and that the plaintiff do refund to the defendants the

sum which the learned Subordinate Judge may find due to the defendants as their share of the said sum of Rs. 12,388-0-4.

In their Lordships' opinion, the plaintiff was compelled to bring the suit, and though he claimed more than he should have done, he was entitled to a substantial amount of the compensation money, and their Lordships think that the defendants should pay the plaintiff the costs incurred by him in respect of the trial in the learned Subordinate Judge's Court. With respect to the subsequent appeals to the High Court and to His Majesty in Council, the claims of both parties were in excess of their rights, and such claims were persisted in to the end. Their Lordships, therefore, are of opinion that the plaintiff, and the defendants should bear their own costs in respect of the appeals to the High Court and to this Board.

The costs of the hearing on remand will be in the discretion of the learned Subordinate Judge.

Their Lordships will advise His Majesty accordingly.

D.D.

Case remanded.

Solicitors for Appellant—*Watkins and Hunter*.

Solicitors for Respondents—*Solicitor India Office*.

* * A. I. R. 1927 Privy Council 139

(From Madras)

A. I. R. 1925 Mad. 932.

28th March 1927

VISCOUNT DUNEDIN, LORD SALVESEN
AND SIR JOHN WALLIS

Krishnamurthi Ayyar—Appellant.

v.

Krishnamurthi Ayyar and another—Respondents.

Privy Council Appeal No. 65 or 1925.

* * Hindu Law—Adoption—Anti adoption agreement—Natural father consenting—Agreements are valid by custom to the extent of creating life-interest in adopting widow even in whole property.

When a disposition is made inter vivos by one who has full power over property under which a portion of that property is carried away, no rights of a son who is subsequently adopted can affect that portion which is disposed of. The same is true when the disposition is by will and the adoption

is subsequently made by a widow who has been given power to adopt. For the will speaks as at the death of the testator, and the property is carried away before the adoption takes place. The consent or non-consent of the natural father cannot in such cases affect the question. But it is quite different when the adoption is antecedent to the date at which the disposition is meant to take effect. The rights which flow from adoption are immediate, and the disposition, if given effect to, is inconsistent with these rights and cannot of itself *vi propria* affect them. In such cases, it is impossible to ascribe any value to the guardianship power of the natural father to bind the son as to property, in which he cannot have an interest until the time when the guardianship has ceased, nor can the case be solved by the doctrine of approbate and reprobate, for the doctrine of approbate and reprobate assumes election and the adopted son has no election. He cannot undo the adoption and be as he was. The same fact destroys the idea of conditional adoption. The adoption cannot be undone; it cannot, therefore, be conditional.

[P. 144, C. 2; P. 145, C. 1, 2]

The only ground on which such arrangement can be sanctioned is custom and it seems that custom has sanctioned such arrangements in so far as they regulate the right of the widow as against the adopted son. It seems part of the custom that one *in que non* of such arrangement should be the consent of the natural father as showing that the arrangement is for the advantage of the boy, and that the mere postponement of his interest to the widow's interest, even though it should be one extending to a life interest in the whole property, is not incompatible with his position as son. [P. 145, C. 2; P. 146, C. 1]

As soon however, as the arrangements go beyond that i. e., either give the widow property absolutely or give the property to strangers, it seems that no custom as to this has been proved to exist and that such arrangements are against the radical view of the Hindu law. It cannot be laid down as a general proposition that all arrangements, consented to by a natural father, and of benefit to the boy, in the sense that half a loaf being better than no bread, he is better with an adoption with truncated rights than with no adoption at all, are valid: *Opinion of Farran, J.*, in 11 Bom. 381, not Appr.; 2 Mad. 91 (P. C.) and 16 Cal. 556 (P. C.) *Expl. and Dist. (Bombay and Madras Cases discussed.)* [P. 146, C. 1]

L. Degruyther and K. V. L. Narasimham—for Appellant.

K. Brown—for Respondents.

Viscount Dunedin.—Ramakrishna Ayyar was a Hindu gentleman in possession of ancestral lands extending to some 135 acres. He was not living joint with any relative, and he was childless. On the 23rd March 1910, he made a will by which he disposed of his property roughly as follows: 12 acres in charity; 44 acres to his wife for her life; 45 acres to the son of a distant connexion, whom he designated as being his adopted son, the appellant in the present suit, and the rest to persons who were connexions, but were

in no case within the degrees entitled to maintenance, and who are the respondents in the present suit. After the death of the widow, part of the land which she held for life was to go to the appellant, part to the respondents. On the same day the natural father of the appellant executed a deed in the following terms

The deed of consent for adoption executed on the 23rd March 1910, in favour of Ramakrishna Ayyar, son of Venkatachala Ayyar, Brahman, Saivito and Mirasidar, residing in Kunnam, Shiyali taluk by Natesa Ayyar, son of A. Ramaswami Ayyar, Brahman, Saivito and Mirasidar, residing in Kunnam village of the said taluk:

You have this day executed a Will and have alienated your own properties. When you asked me to give you my son Krishnamurthi in adoption subject to the condition that he should take only such properties as were given him by the said will and be bound by the alienations made thereunder, I consented to it and admitted the alienations made in the said will, and in pursuance of the arrangement that Krishnamurthi should take only such of the properties as were left to him thereunder, I have executed this deed of consent for adoption in support of my having this day given the said Krishnamurthi my son in adoption.

Immediately, thereafter, the adoption took place with all due ceremony.

Ramakrishna Ayyar died in April 1911, and his wife in June 1911. The present suit was raised in 1918, by the respondents to obtain possession of the properties left them by the will. It was directed against certain parties who were in possession and were alleged to be holding benami for the appellant and also against the appellant.

The persons who were holding as alleged eventually renounced all claim to the property. The appellant, through his guardian, alleged that the adoption had taken place before the date of the will, but it was found, in fact, and is not now contested, that the will was executed *unico contextu* with the deed of consent by the natural father, and that both were executed in view of the adoption which took place subsequently with all due ceremony. It is also admitted that the natural father was a poor man and had two other sons at that time, and has had two subsequently. The sole question in the case is, therefore, whether the will, taken along with the deed of consent, is binding on the appellant so as to cut down what would have been his rights had he been a natural instead of an adopted son.

The learned Subordinate Judge held that the deed was binding in respect of the consent of the natural father; he considered that an adoption, even on such terms, was obviously a beneficial arrangement for the appellant, and that the validity, as he phrases it, of such conditional adoption was settled for Madras by the cases in *Lakshmi v. Subramanya* (1), *Ganapati Ayyan v. Savitri Ammal* (2) and *Visalakshmi Ammal v. Sivaramien* (3).

He accordingly decreed in favour of the respondents. His view was confirmed by the learned Judges of the High Court. They also considered that so soon as it was shown that the arrangement as a whole was beneficial to the adopted son, and that but for the arrangement the adoption would not have taken place, the natural father could give a consent which validated the arrangement as against the adopted son if, when he came to be of age, he sought not to acquiesce therein.

This is most clearly explained by one of the learned Judges:

I am of opinion that where an adoption is made by a Hindu who at the time of adoption had absolute power of disposal over the property, an agreement between the natural father and the adoptive father as regards alienations which the adoptive father wants to make either by a document inter vivos or by will binds the adopted son in all cases where such an agreement would be for his benefit, and that the only question which Courts ought to consider is whether the transaction is for the benefit of the boy to be adopted.

If the adopting father would not make the adoption but for the conditions agreed to by the natural father, and if in spite of those conditions the adopted son would be benefited, there is no reason why the transaction should not be tested like any other agreement entered into by the natural father as guardian of his own son. In the present case the agreement is clearly for the benefit of the appellant, as he gets properties of large value which he would not have got but for the adoption, and there can be little doubt that he would have remained a poor man if the natural father had not agreed to the adopting father making the will and the adoption being conditional on the said disposition.

This view is really based on the case of *Visalakshi Ammal v. Sivaramien* (3) which will be presently examined. The appellant has appealed to the King in Council.

The question is a very important one of general interest. There is a very

(1) [1889] 12 Mad. 490.

(2) [1898] 21 Mad. 10.

(3) [1901] 27 Mad. 577=14 M. L. J. 310 (F. B.).

large body of authority in decided cases which touches it, but it is not concluded by any judgment of this Board. The argument for the appellant is simple enough. An adopted son, from the moment of adoption, occupies the place of a natural son. A natural son, in the case of ancestral property, becomes a co-sharer with his father, with the rights of survivorship and of partition as to the whole ancestral property. This is an incident of Hindu law arising from status. No consent by his natural father could affect that position. His power is limited to the giving or withholding of giving his son in adoption, but if he gives, his power ends.

The present will purports to infringe his rights in three particulars: (1) The gift to charity; (2) the gift to persons outside the family; and (3) the postponement of the son's own right in certain lands till his father's death, and in others till his mother's death.

The argument for the respondents is that, in any view, the law has by custom been relaxed, and that the general proposition which is stated in the view of the High Court is based on authoritative decision and is now the law.

As in several of the decisions to be examined there has been the suggestion that the matter has been decided by this Board, it may be well at once to mention cases where the question has been approached.

The case of *Ramasawmi Aiyar v. Venkataraminayan* (4) was as follows: There was a widow and a son who had been adopted by the husband in his lifetime. During the lifetime of that son, two-thirds of the ancestral property was alienated; the son then died, and the widow, who had been given power to adopt by the deceased husband, then adopted another son. At the time of the adoption the natural father entered into an agreement that the adopted son should not challenge the alienation which had been made. When that son came of age, he entered into an agreement which the Board held was a ratification of the agreement made by his natural father. The general question is dealt with at page 208:

How far the natural father can by agreement before the adoption renounce all or part of his

son's right so as to bind that son when he comes of age is also a question not altogether unattended with difficulty, although the case of *Chitko Raghunath Rajadiksh v. Janak* (5) certainly decides that an agreement on the part of the father that his son's interests shall be postponed to the life interest of the widow is valid and binding. In this case their Lordships think it enough to decide that the agreement of the natural father which has been set out was not void, but was, at the least, capable of ratification when his son became of age.

It seems impossible to hold, as some seem to have held, that this is inferentially a judgment on the general question. The whole point there was that, however the general question stood, there was an agreement which was not void in the sense of being an agreement that was *funditus null*, e. g., an agreement that marriage should be for a limited period, and that, therefore, as there was ratification, there was no need to decide the general question.

The other case was that of *Bhaiya Rabidat Singh v. Maharani Indar Kunwar* (6). The facts were that a widow, with power to adopt, adopted a son and at the same time she obtained a document from the natural father consenting to her being in possession of the whole property during her lifetime. The suit was raised by the nearest relatives to declare the adoption invalid. The Board held that the adoption was duly performed and was recorded in a deed of adoption which made no mention of any condition. No other deed could, therefore, affect the adoption, but Lord Macnaghten, in the course of his judgment, said:

It is difficult to understand how a declaration by [the natural father], or an agreement by him, if it was an agreement, could prejudice or affect the rights of his son, which could only arise when his parental control and authority determined.

It is clear that there is here no judgment on the point, for the judgment merely declared the adoption valid and did not determine any case between the widow and son, but Lord Macnaghten's dictum shows an obvious leaning to the view that an agreement by the natural father should not prejudice the right of the adopted son. It follows, as already said, that the question is not absolutely decided by any judgment of this Board.

Their Lordships will therefore turn to the numerous decisions in India. It will

(4) [1878] 2 Mad. 91=6 I.A. 196=4 Scr. 42 (P.C.).

(5) 11 B.H.C. 199.

(6) [1899] 16 Cal. 556=16 I.A. 53 (P.C.).

be convenient to take the Madras and Bombay decisions separately. But first it will be well to point out that there are distinctions to be drawn between the various cases that arise, but whether these distinctions create any difference in principle is another question. The distinctions to be drawn are these: First, whether the agreement, which is ex hypothesi always made by the natural father, and is also ex hypothesi an agreement but for which the adoption of the son would not have taken place, is made with the adoptive father who is the unfettered owner of the whole property (the fact in the present case), or whether it is made with the widow, who has got from her deceased husband a power of adoption, but who only herself possesses a widow's estate. Second, whether diminutions of the right of the adopted son go only to protect and define in quality the widow's estate, which ordinarily by adoption would be swept away, or whether they go further and give part of the ancestral property to persons outside the family altogether.

It will be convenient to deal with the Bombay cases first, as they begin at the earlier date. *Vinayak Narayan Jog v. Govindra Chintaman Jog* (7). In this case, by a will, the testator, who was a separated person, divided his property practically into two parts, and gave one to his widow absolutely and the other to his adopted son. The son was a nephew, and it was found that the whole arrangement was known to all members of the family. It was acquiesced in by the natural father of the boy. The High Court held that the provision for the adopted son was adequate and that the will could not be challenged by the adopted son. The judgment went on two grounds. First, that although an alienation of the whole estate would be bad and inconsistent with the duties cast upon an adopted son, still, if the provision was adequate, there was no reason why it should not stand. Second, that as the adopted son proposed to take what he could under the will, he could not, on the principle of approbate and reprobate, refuse to acknowledge its validity. It is to be observed that this second view scarcely does justice to the opposing argument. The son did not propose to take his half under the will: he proposed

(7) 6 B. H. C. 224.

to take the whole in right of his position as a son. There is, however, one other sentence which would seem to point to the right of the testator to make an adequate provision for the widow instead of allowing her life interest to be entirely destroyed by the adoption.

Chitko Raghunath Rajadiksh v. Janaki (5). This was an adoption by a widow, subject to a stipulation that the widow should enjoy the whole property during her life, giving the boy maintenance. Held a good stipulation. Haridas, J., puts it partly on what may be called conditional adoption, a view which it is hard to agree to, and partly on approbate and reprobate. To the argument that it was a condition repugnant to Hindu law, he says that there is no text to that effect. Westropp, C. J., in *Radhabai v. Ganish Tatya Gholap* (8), obiter, takes these two cases as deciding the general point.

After this case in date comes the case before this Board in 6 I. A.

Accordingly, in *Ravji Vinayakrav Jagganath Shankarsell v. Lakshmibai* (9), it was sought to urge that this Board's decision had overturned the authority of the former cases, because their Lordships held that the general question was still open. The facts were practically the same as in the first case, i. e., adoption by a widow and a contemporaneous agreement with the natural father that the widow should have full enjoyment for her life. There is a long and very careful judgment by Farran, J. It is too long to quote in full, but may be summarised thus: The early Bombay Shastris or Pundits were logical in holding the strict view. But custom and practice may modify the strict view. The possibility of such an agreement is in no way negatived by a direct text. Fair arrangements for protection of the widow's interest are commonly made and supported. He then prays in aid the judgment of this Board in 6 I. A., but here their Lordships think he is somewhat misled as to the sense in which the word "void" was used. Then, after saying that it is the general law that the guardian of an infant can bind the infant when the contract is made bona fide for his interest, he sums up the matter thus:

(8) [1878] 3 Bom. 7.

(9) [1887] 11 Bom. 381.

I cannot but think that this principle ought to guide the Court in considering whether agreements like the one under consideration can be upheld or not. If the stipulations are unreasonable, such as giving to the widow an absolute power of disposition over the property, they should be rejected as ultra vires of the father; if reasonable, such as only to define a limit of the son's enjoyment of the property, then they should be upheld. The reasoning in the judgment of the Court in the *Chitko* case (*supra*) goes far beyond this view, but the actual decision of the Court is in accordance with it.

Basava v. Lingangauda (10). This was a case where the man who adopted a son conveyed by a deed of gift, which was referred to in the deed of adoption, part of the ancestral property to his daughters, and the natural father was a party to the deed of adoption. Held that the deed of gift was good and binding on the adopted son. The case is taken as plain, and not argued.

The next case is *Vyascharyar v. Venkubai* (11). The facts were: Adoption by a widow and a gift of part of the property to her own daughters. Assented to by the natural father at the time of the adoption. Beaman and Heaton, JJ., referred to a Full Bench the general question:

Whether the terms of an agreement entered into between the natural and adoptive parents as conditions of the adoption are binding upon and can be enforced against the adopted son?

But they added that, if that question was too wide, it ought to be considered in the light of the facts of the case. This was the view taken by the Full Bench, Scott, C. J., Chandavarkar, Batchelor, and Rao, JJ. They held that

an agreement by which the adoptive widow is to be allowed to retain her life interest, notwithstanding the adoption, differs in fact and in principle from an agreement under which a power is conferred upon her which, as a widow enjoying a life estate, she could by no other means obtain.

On the facts, therefore, they held the agreement not binding, holding, first, that the condition was unreasonable and took the test proposed by Farran, J., and, a case of *Venkappa v. Fakirgowda* (12), where a widow was given power to give the property to her own brother, and the condition was held to be bad.

Then came the case of *Balkrishna Motiram v. Shri Uttar Narayan Dev*

(13). This was a gift of an annual sum as a charge on the ancestral property for a charity made by the adopting father and agreed to by the natural father at the time of the adoption. The gift was held bad. Hayward, J., delivering the judgment, examined the cases and sums up thus:

It would appear to have been established by these decisions that agreements for reasonable provision for widows ought to be upheld as valid according to general custom modifying the strict terms of Hindu law. But no authorities have been quoted before us in favour of any other persons in such connection or in support of a general extension of the modification so as to include, as here claimed, reservations in favour of charities and religious endowments.

To sum up the Bombay cases: As a question of actual decision, the Courts have always upheld the grant to the widow of her interest for life, and that whether the stipulation had been made by the husband while still alive, or by herself, it being always the case that the agreement was anterior to or contemporaneous with the adoption itself, and that the natural father concurred. But when the gift is to outsiders it has been held invalid, and that whether made by the widow or the adopting father himself. The reasons given have varied. Some have put the deviation from strict principle on custom, some on the view of approbate and reprobate, and in one case upon the view that the father as guardian can bind an infant by any contract which is for his benefit.

To turn now to Madras.

Lakshmana v. Lakshmi Ammal (14). There is at page 163 a general remark by Turner, C. J., against the validity of conditions imposed by agreement with the natural father, but the remark is based on an erroneous view of the judgment of this Board in *6 I. A.* and is really of no authority. The case itself turns on a speciality.

Lakshmi v. Subramanya (1). This was a case where the adoptive father stipulated that certain lands should be enjoyed by the widow for life. This was agreed to by the natural father. It was held binding. The reasons given by the learned judges were dissimilar. Muthusami Ayyar, J., held that this was just an arrangement for fixing maintenance. Shephard, J., held that the father, being

(10) [1895] 19 Bom. 428.

(11) [1913] 37 Bom. 251=17 I. C. 741=14 Bom. L. R. 1109.

(12) [1906] 8 Bom. L. R. 346.

(13) [1919] 43 Bom. 542=50 I. C. 912=21 Bom. L. R. 225.

(14) [1882] 4 Mad. 160.

at the moment undisputed owner of the property, could do what he liked with it, and that the effect of what he did was really to withdraw that portion of the ancestral property. He repudiated the idea of reasonableness being a test.

Narayanasami v. Ramasami (15). This was precisely the same case as the last and, being decided by the same Judge, Shephard, J., followed the last case, the other Judge simply following the decision and not going into the reasons.

Jagannadha v. Papamma (16). This was a case of adoption by a widow. The agreement was that the widow was to have half the property. Collins, C. J., and Handley, J., held the agreement not binding. They rested on Lord Macnaghten's dictum in 16 *I. A.*, and distinguished this from the case in 12 *Mad.*, in their own Court by which they were bound on two grounds, that in that case the arrangement was by the father himself, whereas here it was by the widow.

Ganapati Ayyan v. Savithri Ammal (2). This was a disposition in charity by the adoptive father, who at the same time gave his widow power to adopt. She adopted; the natural father acquiesced. Held binding. Shephard, J., held that it had been settled by 12 and 14 *Mad.* Subramania Ayyar, J., agreed.

Visalakshi Ammal v. Sivaramien (3). Adoption by a widow. Agreement come to by natural father that, in the event of disagreement between widow and adopted son, widow should enjoy half the property until her death. Referred to Full Bench. The order of reference drawn by Subramania Ayyar, J., contains a weighty argument in favour of what may be called the strict view. He argues:

1. That there is no reason against an adoptive father doing anything in a question with an adopted son which he could have done with a natural son.

2. That if the adoption by a widow takes place after the death of the adoptive father all the provisions of the adoptive father will stand, because the will speaks at his death and takes out of the property whatever is dealt with before the adoption takes place.

3. But further than that the arrangement cannot go, because it is allowing the adoptive father, or the widow, to do

(15) [1891] 14 *Mad.* 172=1 *M. L. J.* 89.

(16) [1893] 16 *Mad.* 400=3 *M. L. J.* 193.

something which is incompatible with the proper position of an adopted son

4. That it is just as impossible for the natural father to do, on behalf of the son to be adopted, anything as regards what is to happen after the adoption as it is for the adoptive father to have acted as to his rights before adoption.

5. Approbate and reprobate cannot apply, for that implies election, and there is no election open to the adopted son. If, on the contrary, it is looked on as a condition, this condition is repugnant and must be disregarded.

The result must be to hold the present case not binding.

But before the Full Bench, Benson, Davies, and Russell, JJ., all concurred in thinking that 6 *I. A.*, indicated that the natural father was not incapable of giving a consent. If that is the position, the only question that remains is, Is it fair and reasonable?—that is to say, Is it for the minor's benefit? Then take Farran's, J., test as to the power of the father. They point out that there is no authoritative text forbidding such an arrangement. They consider a fair and reasonable disposition not inconsistent with Hindu Law, and, therefore, they upheld the arrangement.

To sum up the Madras cases. As regards decision, the general result has been to validate the arrangements so far as provision is made for the widow just as in Bombay, but one case, *Jagannadha v. Papamma* (16) is the other way, and the referring judgment of Subramania Ayyar J. is also of that way of thinking. As regards reasons, again they vary, some going on the power of the adoptive father to do what he likes, some on fair and reasonable arrangements, and some on approbate and reprobate.

It will be apparent from this examination that it is not possible to reconcile all the decisions, and still less the reasons on which they have been based. Their Lordships will, therefore, examine the matter on principle. When a disposition is made inter vivos by one who has full power over property under which a portion of that property is carried away, it is clear that no rights of a son who is subsequently adopted can affect that portion which is disposed of. The same is true when the disposition is by will and the adoption is subsequently made

by a widow who has been given power to adopt. For the will speaks as at the death of the testator, and the property is carried away before the adoption takes place. It is also obvious that the consent or non-consent of the natural father cannot in such cases affect the question. But it is quite different when the adoption is antecedent to the date at which the disposition is meant to take effect. The rights which flow from adoption are immediate and the disposition, if given effect to, is inconsistent with these rights and cannot of itself *vi propria* affect them. There are two propositions so well settled that no authority need be cited. They are, first, that the natural father loses all power over the son from the moment when he is adopted, and, second, that the adopted son has in his new family precisely the same rights as a natural son, save only when the question is one that raises a competition between the natural and the adopted son. Can, then, the consent of the natural father who judges, and, ex hypothesi, rightly judges, that it is more expedient for the boy to be adopted even though his rights are limited, than not to be adopted at all, make any difference? The doubt expressed by Lord Macnaghten in 16 *I. A.* seems unanswerable. How can the consent of the natural father take any effect on the rights of the boy which only arise when his rights as a natural father are non-existent? But if the father cannot do it by virtue of any power in himself, can he do it as guardian of the infant so as to bind him? Farran, J., who is an exponent of this view in the case of *Ravji Vinayakrao Jagganath Shankarsett v. Lakshmibai* (9) was curiously misled by an undue veneration for Mr. Mayne. He quotes a sentence from Mr. Mayne's work as follows:

He (the minor) will also be bound by the act of his guardian when bona fide and for his interest and when it is such as the infant might reasonably and prudently have done for himself if he had been of full age.

This quotation is from the third edition of Mayne's work, and as a universal proposition is obviously unsound. Accordingly, in the fourth edition, which was published soon after the date of the judgment in question, and in all subsequent editions, Mr. Mayne inserted between the words "guardian" and "when

bona fide" the words "in the management of the estate," which turns an inaccurate proposition into an accurate one. But it is no longer of service to Farran, J., in the matter in hand, for assuredly the natural father is not managing the estate of his child when the estate referred to is the estate which he will only get after adoption by another person. Therefore, reverting again to Lord Macnaghten's dictum, it seems impossible to ascribe any value to the guardianship power of the natural father to bind the son as to property, in which he cannot have an interest until the time when the guardianship has ceased.

Next, can the case be solved by the doctrine of approbate and reprobate? Their Lordships think clearly not for the doctrine of approbate and reprobate assumes election, and the adopted son has no election. He cannot undo the adoption and be as he was. The same fact destroys the idea of conditional adoption. The adoption cannot be undone; it cannot, therefore, be conditional.

It will be seen from these views that in their Lordships' opinion the only ground on which such arrangement can be sanctioned is custom. They are of opinion that there is such a consensus of decision in the cases, with the exception of the case of *Jagannadha v. Pappamma*, (16) that they are fairly entitled to come to the conclusion that custom has sanctioned such arrangements in so far as they regulate the right of the widow as against the adopted son. It seems part of the custom that one sine qua non of such an arrangement should be the consent of the natural father. But if this is looked at narrowly, it is only because it is a part of the custom that it is either here or there. This leads to the remark that there is a good deal of looseness in the discussions in the judgments as to reasonableness. Some look at it from the point of view if whether, in view of the adoption only being granted on condition of the arrangement, is this, in the circumstances, reasonable for the boy. It would seem that it might well be assumed that if a natural father consented to give his son in adoption, he would only do it if it were reasonable, i. e., for the boy's benefit in the circumstances. Others look at it from the point of view whether the adoption will put the boy in a reason-

able position, i. e., not subject him to the duties of a son to do worship for his adoptive father without giving him sufficient advantages to enable him to do so. But the consensus of judgments seems to solve these two questions in this way, namely, that the consent of the natural father shows that it is for the advantage of the boy, and that the mere postponement of his interest to the widow's interest, even though it should be one extending to a life interest in the whole property, is not incompatible with his position as a son. Their Lordships are, therefore, prepared to hold that custom sanctions such arrangements.

As soon, however, as the arrangements go beyond that, i. e., either give the widow property absolutely or give the property to strangers, they think no custom as to this has been proved to exist and that such arrangements are against the radical view of the Hindu law. Their Lordships are, therefore, against the idea of a general proposition that all arrangements consented to by a natural father, and of benefit to the boy in the sense that half a loaf being better than no bread, he is better with an adoption with truncated rights than with no adoption at all, are valid. They would further say that the remark made by some learned Judges that there is no text prohibiting such arrangements seems to them to go exactly to the opposite effect. Inasmuch as what is sought to be done is admittedly contrary to the strict and natural view of the Hindu law as to the true position of the adopted son in his new family, it would seem more to the point to say that there is no text which sanctions any contrary arrangement.

Applying these views to the present case, it follows that their Lordships consider that the will here can have no effect, and that the appeal must be allowed and the suit dismissed. The appellant must have his costs before this Board and in the Courts below.

Their Lordships will humbly advise His Majesty accordingly.

D.D.

Appeal allowed.

Solicitors for Appellant—*Hy. S. L. Polak.*

Solicitors for Respondents—*Douglas Grant and Dold.*

* A. I. R. 1927 Privy Council 146

(From Rangoon)

31st March 1927

LORDS ATKINSON AND CARSON, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON

Maung Sin—Appellant.

v.

Ma Tok—Respondent.

Privy Council Appeal No. 68 of 1926.

* *Limitation Act, Art. 182 (7)*—*Decree directing payment of annuity and in default, delivery of certain property to decree-holder—Each instalment of annuity is a claim under decree and each default gives rise to right to recover property.*

The respondent, on the 30th September 1916, obtained a decree by which certain properties were to be left in possession of the appellant, who was to pay to the respondent annually a sum of Rs. 2,000 in the month Kason, or in default of payment of the same (Rs. 2,000 annually) the said property would be made over to the respondent. On the 8th October 1924, the respondent filed an application for execution of the decree against the appellant in default of payment of two instalments of Rs. 2,000 each, for the years 1923 and 1924 respectively, and claimed, as the judgment-debtor failed to pay according to the decree, that the Court might direct the delivery of the lands by the judgment debtor to the decree-holder. It was pleaded that execution was time barred.

Held: that each instalment as it became due was a claim originating under the decree from the date when such claim arose, that the provisions of Cl. 7 of Art. 182 applied and that therefore execution to recover the two instalments was not barred, nor was the claim of respondent for delivery of property was barred either, as on the occasion of a default in each payment the right of the respondent to have the said property made over to her arose.

[P 146 C 2; P 147 C 1, 2]

A. M. Dunne and *L. R. Dunne*—for Appellant.

S. Moses—for Respondent.

Lord Carson.—The respondent, who is the wife of the appellant, on the 30th September 1916, obtained a decree in the District Court of Sagaing in terms of an award which had been previously made by which certain properties contained in a list attached to the award and the decree were to be left in possession of the appellant (defendant), who was to pay to the respondent (plaintiff) annually a sum of Rs. 2,000 in the month Kason, or in default of payment of the same (Rs. 2,000 annually) the said property contained in the said list would be made over to the plaintiff respondent. It appears that after the making of the decree the parties lived

together until the year 1923, when they separated.

On the 8th October 1924, the respondent filed an application in the District Court of Sagaing for execution of the decree against the appellant in default of payment of two instalments of Rs. 2,000 each for the years 1923 and 1924 respectively, and claimed, as the judgment-debtor failed to pay according to the decree, that the Court might direct the delivery of the lands in the said list by the judgment-debtor to the decree-holder, the respondent.

The respondent also filed an application rendering an account of the sums alleged to have been received by her, in pursuance of the decree, up to May 1922, and requesting that this might be noted in Court. The appellant, however, denied that he had ever made any annual payments and pleaded that the execution of the decree was time barred, and also alleged that even if the payments had been made, they could not be recognized by the Court because they had not been certified within the time limit of the Court under O. 21, R. 2.

The learned District Judge before whom the case was first tried held that as the payments alleged, even if made, had not been certified, they could not be recognized by the Court, and that therefore, as no payment had been made from the date of the decree to the date of the claim for execution, such claim was barred by the Limitation Act.

The High Court, however, decided that, having regard to the provision of Clause 7 of Article 182 of the Schedule of the Limitation Act, no question of limitation could possibly arise, and that as failure to pay these two instalments was admitted, the respondent was entitled to execution in respect of them; and they also held that the respondent was entitled to execute the decree for the two annual payments, Rs. 2,000 each, and also, as she claimed, possession of the property to which the decree referred. The question as to whether the alleged payments during the intervening years between 1916 and 1923 were, in fact, paid, or were to have been taken as paid according to the evidence given, was discussed and considered at some length in the High Court, as was also the question of whether the claim of the respondent to have such payments

certified was barred by time limit. In the view, however, which this Board takes of the construction of the original decree, their Lordships think that it is unnecessary to pronounce any opinion upon the question of the application of the Limitation Act to the certification of the payments, or as to the effect of the absence of such certification. Their Lordships are of opinion that upon the true construction of the decree each instalment as it became due was a claim originating under the decree from the date when such claim arose, and that the provisions of Clause 7 of Article 182 of the Schedule to the Limitation Act therefore applied.

It was contended, however, on behalf of the appellant at the hearing before their Lordships that even if a decree could be made for the annual payments due in 1923 and 1924, nevertheless the respondent was not entitled in default of each payment to have the property mentioned in the decree made over to the respondent, the argument being that, as no claim was made to the possession of such property on default of payment during the early years after the decree, time commenced to run from the date of the earliest default, and the claim to the land was therefore time barred.

Their Lordships cannot agree with this contention. They are of opinion that upon the construction of the decree itself, on the occasion of a default in each payment the right of the respondent to have the said property made over to her arose, and therefore the claim to the lands was not time barred.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

D. D.

Appeal dismissed.

Solicitors for Appellant—*Bramall & Bramall.*

Solicitors for Respondent—*T. L. Wilson & Co.*

* * A. I. R. 1927 Privy Council 148

(From Singapore)

29th March 1927

VISCOUNT HALDANE, LORDS PHILLIMORE AND DARLING

Daing Soharah Binte Daing Tadaleh and another—Appellants.

v.

Chabak Binte Lasaliho and another—Respondents.

Privy Council Appeal No. 59 of 1926.

* * Contract Act, S. 16—*Gift to person in fiduciary relation—Donee must prove that gift was outcome of donor's free will and not of his influence.*

The relief given by a Court of Equity is a secondary consequence of the principle that a person, standing in a relationship in which authority or influence may be supposed to exist, cannot hold a mere gift without making it clear that the intention to make it was not the result of his influence. The relationship itself does not necessarily preclude the making of the gift; but the burden lies on the donee to show that there was no such influence as to the source of the gift. But he can discharge the burden incumbent on him by showing that the relationship notwithstanding, the donor knew completely what he was doing, and acted of his own completely free will. With certain kinds of fiduciary relations, such as that of a solicitor taking a gift from his client, this is, obviously, much more difficult to establish than in others where the duty is less definite. Courts of Equity have therefore exercised a certain freedom in their decisions as to where and how the principle must be applied. [P 150, C 1]

H. B. Vaisey and H. C. Bischoff—for Appellants.

W. Greene and Cecil W. Turner—for Respondents.

Viscount Haldane.—The appellants are two of the plaintiffs in an action in the Supreme Court of the Straits Settlements (Singapore Settlement) which they brought against the respondents. The first respondent was sued as administratrix of the appellants' nephew, Hadji Mohamed Said, deceased, and the second respondent was sued as the administrator of their niece, Etendir binte Laplamni, deceased. The claim was to set aside an assignment, dated 19th September 1921,

under which the appellants and a deceased sister, who was originally to be their co-plaintiff, had assigned to Hadji Mohamed Said and Etendir binte Laplamni all their interest in leasehold property belonging to them at Singapore, and for an account of all moneys received by Hadji Mohamed Said since the 30th December 1919, the date on which he had been appointed as the plaintiffs' attorney in regard to the leasehold property in dispute. The only question in this appeal is whether, in the circumstances, and having regard to the alleged fiduciary position of the attorney, the assignment was binding on the plaintiffs. The first respondent as administratrix of Hadji did not dispute her liability to account for the rents received by him down to the date of the assignment.

The action was tried before the Chief Justice of the Straits Settlements, Sir Walter Shaw, in March 1925. He decided that there was no undue influence and dismissed the claim. The Court of Appeal in June 1925, affirmed the dismissal.

It is important to see what the claim was as originally launched. The plaintiffs were old ladies over 70. They lived mainly in Borneo and were alleged to have been acquainted neither with English nor with Malay. The assignment was drawn up in English. The statement of claim charges a fraudulent misrepresentation made by Hadji that the assignment was merely a document enabling him to take over the administration of the property after the deaths of the plaintiffs. There was expressed in the document, as consideration for the grant in it, a covenant to maintain the plaintiffs for the rest of their respective lives. The allegation in the statement of claim was that this consideration was a mere pretence to which effect was never given. The defence denied the alleged fraudulent misrepresentation and the unreality of the consideration expressed.

The trial Judge held that there was no proof of fraud. The case before him had also been put on the ground of undue influence and he dismissed it in so far as concerned this ground also. The Court of Appeal agreed. The judgment in the first Court does not go into the

circumstances in detail, and it is necessary, in order to appreciate their bearing, to restate them. The plaintiffs were three Bugis ladies, two of them married and the third a widow. They lived in Borneo, a long way off, where they had other property, and they also owned the property in question in Singapore. This was looked after for them by their nephew, Hadji Mohamed, who lived in Singapore, and who used to collect the rents and was allowed, temporarily at least, to keep them in his own hands. In 1919 the ladies had given Hadji Mohamed a power of attorney to "adjust all affairs respecting our houses and property . . ." and to receive payments and give receipts. In 1921 the ladies who were Mohammedans and, as already stated, of advanced ages, decided to make the pilgrimage to Mecca. They landed in Singapore en route, and took the opportunity of arranging their affairs. They appear to have consulted a Mr. Bazeley, a solicitor of the firm of Allen and Gledhill at Singapore. He and his assistant, Mr. James, gave evidence very fairly. They prepared the deed and wills to be presently referred to, and acted for all parties, but there is nothing to show how or by whom they came to be employed or who paid their costs. In 1919 they appear to have acted for the ladies in recovering from a previous agent, Hadji Samsudan, the title-deeds of the property. That agent appears to have been indebted to the ladies in a large sum for arrears of rent, and this had to be deducted from the value of an interest which he had in the property. Hadji Mohamed appears to have been appointed in his place, and Allen and Gledhill were in communication with him.

Mr. Bazeley, their partner, prepared the assignment of the 19th September 1921, and also wills for the two appellants and the husband of one of them. Under the wills of the ladies Hadji Mohamed and his sister, Etendir, were to take the property. The wills were executed on the 26th September but the assignment was executed seven days previously, on the 19th.

Mr. Bazeley and Mr. James stated that they could not recall precisely what happened, but they had no doubt that they explained to the ladies the character of the assignment. In the books

of the firm there is an entry showing that they attended on the 21st September at the house of Hadji Mohamed, where the wills of these two ladies were translated to them and executed. Mr. Bazeley was not versed in the Malay language, but Mr. James was. There is no evidence of any entry in the books about the execution of the assignment on the 19th. The appellant, Daing Tadaleh, asserted that she did not know Malay, but that Hadji Mohamed explained to her that under the documents which she signed the property would be distributed after the deaths of the three sisters. She says that she did not know what the nature of her will was. Her husband, Abdul Siraj, also gave evidence. He said that Hadji Mohamed told them that the document was a will. He is a Bugis and says that he does not know Malay.

It was on the footing of the alleged misrepresentation by Hadji Mohamed that the assignment was only a will, that this action was launched. The Courts below have found concurrently that there was no such misrepresentation. The Chief Justice, in deciding this case at the trial, said:

I do not accept the evidence of the first plaintiff and her husband taken out of Court *de bene esse* as to the alleged fraud perpetrated by Hadji Mohamed on the execution. They are very old and infirm people, and their memories are, obviously, defective as to what took place, and they are probably confusing the execution of the assignment with the execution of the wills of the three plaintiffs, which the defendants' evidence satisfies me took place not on the date when the assignment was executed, but on another day about the same time. I was satisfied that both the husbands of the first two plaintiffs understood Malay—one of them even signed in Malay characters and that the alleged misinterpretation of the solicitor's description of the effect of the document could not have been successfully carried out.

The Court of appeal concurred in this finding, and it has not been challenged in the argument in the present appeal. The fact that the case was put at the trial on this footing has a material bearing on the form of the evidence given. It accounts to a considerable extent for the deficiency in the sort of evidence which would naturally have been tendered for the defendants had the case presented been one simply of the burden on an assignee who stands in a fiduciary position of giving full details

of the circumstances under which the assignment to him was made. It was a case of this second kind that was the only one opened in that appeal. It was, in their Lordships' opinion, open to the appellants to make it, although it had not been distinctly stated in that form in the statement of claim. But the appellants have to bear the responsibility of not having brought forward in the Courts below evidence, for instance, as to the position of the solicitors, which ought to have been before the Judicial Committee when such a case was made. Hadji Mohamed was the agent of the ladies in the management of the property, and he was bound, before taking anything in the nature of a gift from them, to make it clear that they knew exactly what they were doing and acted of their own free will. The relief given by a Court of Equity is a secondary consequence of the principle that a person, standing in a relationship in which authority or influence may be supposed to exist, cannot hold a mere gift without making it clear that the intention to make it was not the result of his influence. The relationship itself does not necessarily preclude the making of the gift; but the burden lies on the donee to show that there was no such influence as to the source of the gift. The Courts have refused to enumerate exhaustively the cases in which the presumption of undue influence will *prima facie* be made. Religious influence is included, and so are many other classes of influence in which the donee may from his position be presumed to be likely to have exercised special influence over the mind of the donor. But he can discharge the burden incumbent on him by showing that, the relationship notwithstanding, the donor knew completely what he was doing, and acted of his own completely free will. With certain kinds of fiduciary relations, such as that of a solicitor taking a gift from his client, this is, obviously, much more difficult to establish than in others where the duty is less definite. Courts of Equity have therefore exercised a certain freedom in their decisions as to where and how the principle must be applied. This appears to their Lordships to be the outcome of numerous authorities which they have examined.

With these observations their Lordships turn to the character of the assignment itself of the 19th September, 1921. After reciting the title to the property in question of the three ladies, it states that they are desirous of assigning it to Hadji Mohamed and Etendir, and that the premises to be assigned are of the value of \$90,000. It assigns, in consideration of natural love and affection for their relatives, and of the latter having maintained them for some time past, and of their agreeing to maintain them for the future during their respective lives, the premises, as to two undivided thirds for Hadji Mohamed and as to one-third for Etendir, absolutely. There follows a covenant for the maintenance, in the future in the same way as in the past, of the assignors by the assignees. This assignment was in English, and, as already stated, the solicitors, although they cannot recall the circumstances, are certain that it was translated to the assignors.

No proceedings were taken to question the gift for about three years. Under the circumstances, and having regard to the fact that the action, when launched, was launched on a basis that has been disproved, their Lordships think that the Courts below were justified in refusing to set it aside. The relationship of the parties, the desire, naturally to be inferred, of the ladies to make a disposition of their affairs before going away on a long journey to Mecca, and the opportunity afforded by the flying visit to Singapore, where the property was but where they were not resident, all render it probable that the transaction had been considered and represented the deliberately conceived intention of the assignors.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

D.D.

Appeal dismissed.

Solicitors for Appellants—*Speechley, Mumford & Craig.*

Solicitors for Respondents — *E. F. Turner & Sons.*

* * A. I. R. 1927 Privy Council 151

(From Rangoon)

31st March 1927

LORDS PHILLIMORE AND WARRINGTON
AND SIR JOHN WALLIS*John Agabog Vertannes and others—*
Appellants.

v.

James Golder Robinson and another—
Respondents.

Privy Council Appeal No. 17 of 1926.

* * (a) *Will—Construction—“Effects” may mean moveable and immovable property.*

The word “effects” like many other words of general and indefinite meanings, may be sufficient in a certain context to pass immovable as well as moveable property. Primarily, it refers to personal estate and moveables. But where a will provided: “I give and devise and bequeath my three houses numbered respectively 68, 68A, 68B, in Halpin Road . . . together with land thereto belonging and all the out-offices and buildings standing thereon, and all my household furnitures, carriages, horses, chattels and effects, and all moneys and debts due and owing to me which I shall be possessed of at the time of my death unto my said executrix absolutely.”

Held; that the words “which I shall be possessed of at the time of my death” refer solely to “the household furniture, carriages, horses, chattels and effects.” And after the specific reference to the Halpin Road property, it is not lightly to be inferred that the testator intended that his other lands, whether then owned by him or to be acquired thereafter, should pass by general words, as such general words. *English cases discussed.* [P. 151, C. 2; P. 154, C. 1, 2]

* * (b) *Probate and Administration Act (1881), S. 4—Property not covered by will disposed of by executor as his own without dividing it among sharers—Vendee knowing the terms of will cannot acquire good title.*

Where the executor took charge of the property not mentioned in the will and instead of dividing it among the heirs of the deceased disposed it off as his own and the vendee knew of the will and had taken legal advice on its construction,

Held: that the vendee must be deemed to have been aware of the infirmity of the executor's title and he could not rely upon the conveyance; 42 Cal. 56 (P. C.), *Expl.* [P. 155, C. 1, 2]

(c) *Evidence Act, S. 116—Tenant.*

Tenant cannot challenge title of his landlord. 42 I. A. 202, *Foll.* [P. 155, C. 2]

(d) *Evidence Act, S. 115—Person misled by mistaken legal advice and not by representations by another—The other is not estopped.*

If A is misled by erroneous advice of counsel on a point of construction of a will, and not by any act or representation of B, a beneficiary under the will, B is not estopped from claiming under the will his benefits as against A.

[P. 156, C. 1]

A. M. Dunne and E. B. Raikes — for Appellants.

G. R. Lowndes, H. B. Vaisey and R. W. Leach—for Respondents.

Lord Phillimore.—The narrative in this case is to the following effect: Sarkies Vertannes was an Armenian Christian practising as a solicitor in Rangoon. In 1886 he made his will, and the material part is as follows:

This is the last Will and Testament of me Sarkies Vertannes of No. 68A, Halpin Road, in the town of Rangoon, British Burma. I do hereby appoint Mary my wife the sole executrix of this my will. I do hereby revoke all wills and dispositions heretofore made by me, and do publish and declare this to be my last will and testament. I give and devise and bequeath my three houses numbered respectively 68, 68A, 68B, in Halpin Road, in the said town of Rangoon, together with land thereto belonging and all the out-offices and buildings standing thereon, and all my household furnitures, carriages, horses, chattels and effects, and all moneys and debts due and owing to me which I shall be possessed of at the time of my death unto my said executrix absolutely.

He died in May, 1897. At that time he was possessed of other immovable property besides that mentioned in his will—namely, certain land at Kokine in a suburb of Rangoon—and it is concerning this land that the dispute has arisen.

His widow obtained probate of the will and administered the estate, sold the three houses in Halpin Road which are specified in the will, paid all the debts including a mortgage on the Kokine land and was left finally with this land free from incumbrances and Rs. 19,000 in August 1904.

The family then moved to the Kokine land and have resided there ever since, none of them having married. The eldest son died in 1917 intestate.

There is valuable brick earth upon the Kokine land, and the widow embarked on a brick-making business in which she was assisted by her eldest son as long as he lived.

The second son, who is the first defendant in the suit, came to England and acquired a call to the Bar, returned to Rangoon in 1900 and has practised as a barrister there ever since. The widow is the second defendant. The third defendant is the one daughter. She was of full age before 1904 and carried on a dairy business on the same land.

The fourth and fifth defendants were boys at the time when the family settled at Kokine. The fourth defendant was

for a short time, in the Port Commissioner's Office and then volunteered for service in the war, and was absent from January 1915, till February 1922. The fifth defendant is in a mercantile office at Rangoon. This completes the family.

The widow appears to be a masterful and capable woman. She is stated to have helped her husband in his legal work, and she took full control of the family and of the property. It is probable that she thought that the Kokine land had been devised to her by virtue of some of the general words in the will; but it may be that she accepted the position that there was an intestacy as to these lands, and that her beneficial interests were limited to her widow's share, and that she notwithstanding had as executrix full power of disposition. Which view her children took is uncertain.

The first defendant, who ought to have known as much law as his mother, says, in his deposition, that he always thought that there was an intestacy as to this land, but that his mother convinced him that as executrix she had full power of disposition. Whether this be a correct statement of what passed between them and of his original view of the situation, is somewhat uncertain. But the point becomes immaterial.

The younger children certainly acquiesced in the assertion by the mother of her full right of disposing of the property, very likely without minute enquiry as to the origin of this right. But they all deposed that they always believed that they had shares in the land. Nothing appears as to the view taken by the deceased son.

Though it is said that very good bricks were made, the business was not carried on at a profit; or, perhaps, it should be stated that it was not carried on at such a profit as to maintain the widow and to maintain the children so far as they were not maintaining themselves; and the widow began a course of borrowing on mortgage—probably in the first instance to purchase plant for the business.

On the 3rd November 1904, she mortgaged the property to a Chetty to secure Rs. 20,000. The deed contains no recital of the will or of her title as executrix. It was made by her as if she were absolute owner. The first defendant, however, joined in it as a surety. He thus became aware of its contents, and if he

really, at the time, thought that there was an intestacy as to this property, it is remarkable that he, being a barrister, should have allowed the deed to take the shape which it did.

On the 15th November 1905, this mortgage was paid off, and a fresh mortgage given to the Burmah Building and Loan Association Limited for Rs. 30,000. The first defendant was not required to act as surety in this transaction.

On the 1st February 1909, the Burmah Building and Loan Association Limited assigned its mortgage to the firm of Robinson & Mundy, in which the present plaintiff, Mr. Robinson, was one of the partners. The firm were engineers and contractors and purchasers of the bricks. The widow was one of the attesting witnesses to this assignment, and presented it for registration. Shortly after this, the firm of Robinson & Mundy were requested by the widow to make further advances, and began, on the 6th January 1910, with an advance of Rs. 800; and seventy-three further receipts for similar advances all for comparatively small sums and certain promissory notes were produced at the trial.

Early in 1916 Robinson & Mundy dissolved partnership, and the debt due from the widow was agreed to be assigned to Robinson.

By deed dated the 17th February 1916 Robinson and Mundy reconveyed the property to the widow; but the plaintiff Robinson kept the title-deeds to secure an equitable mortgage for the debt, which was reckoned up on the 1st April 1916, as amounting to Rs. 91,600. The widow also gave a promissory note for this sum to the plaintiff.

On the 21st April 1917, the plaintiff required his money, and wrote to the first defendant to say that he must tell his mother that if the interest due was not paid off he would call in the whole of the loan. The first defendant states that this came as a surprise to him, and that he had no idea of the extent of his mother's borrowing till he then came to inquire.

However this may be, negotiations by the first defendant and his mother with the plaintiff then began. They resulted in an agreement of the 9th May 1918, between the three, whereby the widow, described as the mortgagor, agreed to transfer forthwith absolutely to the plaintiff

the land, the bricks, and the brick making plant. The plaintiff agreed not to sell the property for a year, though he was to be allowed to sell bricks or any part of the plant. He agreed to convey the property to the mortgagor or to any person she might name for the sum of Rs. 1,09,660, which was agreed as the then existing amount of debt.

The plaintiff agreed to let the premises to the first defendant, who was described in the agreement as the bailee, for twelve months from the 1st May at the rent of Rs. 150 per month. There were some other provisions not necessary to relate. Of even date with this agreement was a conveyance of the property in the ordinary form by the widow to the plaintiff, the consideration being the release of the debt.

When the year came to an end, the first defendant asked to be allowed to continue tenant, and was allowed to remain on for a time from month to month. Towards the end of 1919 the plaintiff's representative entered upon the land for the purpose of making bricks, but the family remained living there, and the dairy business was kept on.

On the 14th May 1920, formal notice to quit at the end of the month was sent to the first defendant and this was countered by a lawyer's letter sent on behalf of the three younger children objecting to the plaintiff manufacturing bricks and injuring the property, and claiming shares in the land as heirs of their father, stating further that they had been in occupation since his death.

Thereupon, on the 17th September 1920, the plaintiff brought suit.

By his plaint the plaintiff averred that the property had passed to the widow by the will of her husband, that probate of the will had been obtained by her as executrix, that she lived on the land with her children, had mortgaged it and finally conveyed it to him. He related the circumstances of the lease to the first defendant and payment of rent up to a certain date, and put the other defendants in the position of persons living on the premises during the tenancy by the leave and license of the first defendant, then stated the notice to quit and the contention raised by the third, fourth and fifth defendants, and claimed

ejectment, possession, rent in arrears, mesne profits and costs.

The second defendant put in no defence. The first defendant by his written statement set up his father's intestacy as regards this property and his claim as one of his sons to a share in it, and said that he entered into the agreement of the 9th May 1918, under the mistaken belief that his mother as executrix had power under the Indian Succession Act to mortgage and sell the property. He contended, therefore, that he had attorned tenant under a mistake as to the plaintiff's legal position, and that he was entitled to resist ejectment.

The third and fifth defendants delivered a joint statement setting up the intestacy, saying that they and the fourth defendant had lived upon the land in their own right and denying all knowledge of the transactions between the plaintiff, the first defendant and their mother. The fourth defendant delivered a written statement substantially to the same effect.

When the issues came to be settled the plaintiff asked for an Issue No. 11 in the following words :

Are the defendants or any of them estopped from disputing the plaintiff's title by the provisions of Ss. 115 and 116 of the Evidence Act ?

This was allowed on terms that he gave particulars of the estoppel which he relied upon ; and these particulars, as will appear later, are of importance.

When the case came to trial, three questions arose : the first turns on the construction of the will ; the second upon the power of the widow, if she was not devisee under the Will to sell the property as executrix ; and the third as to the alleged estoppel of the defendants, or, as it might otherwise be put, their conduct disentitling them to equitable relief.

The District Judge came to the conclusion that the Will did not pass the Kokine land, and that the widow did not convey the land as executrix, but that the conveyance was nevertheless valid, subject to the right of the children if they were not estopped by conduct or otherwise to charges on the land for the value of their shares.

He held that the first defendant was estopped from disputing the landlord's title under S. 116, but that none of the defendants were estopped under S. 115.

He, therefore, gave a decree for ejectment of all the defendants and delivery of possession of the land and premises to the plaintiff, who was to have possession subject to charges for such distributive shares under the Indian Succession Act as the first, third, fourth and fifth defendants should be able to substantiate in properly instituted proceedings; and a decree for mesne profits against Defendant No. 1, with costs against Defendants Nos. 1 and 2.

Both sides appealed from this decision, and the Judges in the High Court differed in opinion from the District Judge. They thought that the word "effects" in the will was sufficient to pass the Kokine land to the widow, and that if it were otherwise the first, third and fifth defendants would be estopped by conduct. They agreed with the District Judge in thinking that the first defendant was also estopped as tenant, and the fourth defendant was not estopped by conduct. On the whole, they granted the plaintiff the decree which he sought for and dismissed the appeal of the first, third, fourth and fifth defendants with costs.

It is from this decision that these four defendants have appealed to His Majesty in Council.

Upon the first point—that of the construction of the Will—their Lordships agree with the District Judge and are not of the opinion of the Judges in the High Court.

No doubt the word "effects," like many other words of general and indefinite meaning, may be sufficient in a certain context to pass immovable as well as moveable property. Further, it was rightly submitted by counsel for the respondent that if this would be so in Great Britain, it would be so a fortiori in India, where there is little distinction between moveable and immovable property when matters of succession have to be considered.

But the context in this case is not capable of such a construction. After the specific devise of the three houses in Halpin Road, the Will proceeds

and all my household furniture, carriages, horses, chattels and effects which I shall be possessed of at the time of my death.

It does not say "all other." The words "which I shall be possessed of

at the time of my death" refer solely to "the household furniture, carriages, horses, chattels and effects." And after the specific reference to the Halpin Road property, it is not lightly to be inferred that the testator intended that his other lands, whether then owned by him or to be acquired thereafter, should pass by general words, as such general words.

A number of cases were cited by the District Judge in which the word "effects" appears in the Will and in some of which the word was held sufficient, in others insufficient, to pass land. Primarily no doubt, the word refers to personal estate or moveables.

At their Lordships' bar counsel further relied on two authorities, *Hogan v. Jackson* (1) for the special expression of Lord Mansfield's opinion (at p. 304); and *Attorney-General for British Honduras v. Bristowe* (2) for the language (at p. 149). No doubt in the first of these cases Lord Mansfield did say that the word "effects" was enough to pass the freehold interest in land. But the words of the devise were

all the remainder and residue of all the effects both real and personal which I shall die possessed of;

and the only plausible suggestion for a meaning of "real effects," if they did not carry freehold land, was that they should be limited to chattels real which in the context was most unlikely.

In the case of *Attorney-General for British Honduras v. Bristowe* (2) one Grant, who carried on an enterprise called "Grant's Work," cutting long wood on a particular piece of land under license from the Spanish Government, ultimately after a series of circumstances, came to acquire a holding title to the land itself. He, by his will, after denouncing the evil effects of slavery, manumitted all his negro slaves, making them subject to certain legacies, and in order that they might be able to pay these legacies off, left to them

and to their heirs and assigns, all my effects of what kind soever I may have in the Bay Honduras, money in Great Britain or elsewhere my lands and effects in Jamaica excepted.

He proceeded to establish regulations for the government of the slaves as a community, and in the opinion of

(1) 1 Cowper 299.

(2) [1881] 6 A. C. 143=50 L. J. P. C. 15=44 L. T. 1.

their Lordships, evidently intended that the slaves should enjoy the land and undertaking as a community under the regulations which he laid down by his Will. This case is far removed from that which their Lordships now have under consideration and cannot help the respondent.

Their Lordships can accept the view of the High Court that effects might include real estate, and that the words "due and owing to me" only qualify the words "moneys and debts" and may be omitted for the purpose of construction. But even so, they cannot hold that there is any indication of the testator's intention to devise any land which he had or might hereafter have beside the Halpin Road property.

The first point being, therefore, disposed of in favour of the appellants, the next question turns on the power of the widow to convey this property as executrix. By S. 4 of the Probate and Administration Act, all the property of the deceased vested in the executrix as such, and if it had been necessary in the course of winding up the estate to part with or charge this property, the executrix could have made a good title. But the estate had been wound up by the year 1904, completely wound up, unless it be said that the executrix had not discharged her duty by transferring to the children their various shares. Her neglect to discharge that duty did not confer on her a title nor give a good title to one who took from her with knowledge of the circumstances, and inasmuch as the plaintiff knew of the will and had taken legal advice upon its construction, he must be deemed to have been aware of the infirmity of the title of the widow.

The case of *Biraj Nopani v. Pura Sundary Dasse* (3) was cited on behalf of the plaintiff; but in that case the property was charged with two annuities and had then been mortgaged to pay the cost of past litigation, and the mortgage was being called in, and so the property had to be sold, and the executor was the proper person to make a good title. The doubt in the case arose because it happened to be the fact that the executor was one of the sons of the daughter of the testator, and that both his two bro-

thers were also parties to the conveyance as grantors to the exclusion of their sisters, while in law the sons of the testator's daughter were not the heirs, and had no interest to convey, because the daughters took their mother's stridhan. The contention raised against the validity of the conveyance was that it was made by people who had no title, but their Lordships thought that whatever might be the impression under which the vendors conveyed, the one of them who was executor could make a good title to a purchaser for value. The head-note of the report is unfortunately misleading. It describes the executor and his brothers as having beneficial interests in the property, whereas in fact they had no such interest.

In their Lordships' view the plaintiff cannot here rely upon the conveyance by the executrix being more than a conveyance of her own share or as passing the beneficial interests of the children.

The question of estoppel remains.

As regards the first defendant, his case seems concluded by S. 116 of the Evidence Act, which is as follows:

No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the license of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such license was given.

Upon this point both Courts below have come to the conclusion which commends itself to their Lordships.

The case of *Bilas Kunwar v. Desraj Ranjit Singh* (4) is an authority, if any were necessary, in support of the view that has been taken.

Their Lordships are therefore relieved from the necessity of considering whether this defendant might also be held estopped under the general provisions of S. 115, or whether, as counsel for the plaintiff preferred to put it, he was deprived by his conduct of a claim to equitable relief.

The case of the third, fourth and fifth defendants is different. It was, indeed, suggested that they also came under S. 116, because they were in occupation under the leave and license either of the

(3) [1914] 42 Cal. 56=24 I.C. 296=41 I.A. 189 (P.C.).

(4) [1915] 37 All. 557=30 I.C. 299=42 I.A. 202 (P.C.).

plaintiff or of his tenant, the first defendant. But their Lordships do not take this view of the facts.

As regards estoppel properly speaking, when the particulars given by the plaintiff come to be considered, any such case disappears. There was no representation by these defendants to the plaintiff that the property was wholly their mother's, or that she had the title to dispose of it as executrix. If the plaintiff supposed that the property was the mother's it was not by reason of any representations made by these defendants. It was a common error. He had as long ago as May 1909, taken the opinion of counsel upon the construction of the will and had unfortunately received erroneous advice. Moreover, the dates given in the particulars for the supposed representations are too late. The plaintiff made no change in his position at or after those dates. He had committed himself to the advances to the widow long before. The case of *Kuverji v. Babaji* (5), which was cited in the course of the argument, is a useful authority.

Counsel for the plaintiff appreciated this position, and submitted that it was not so much a case of estoppel as a case of parties seeking equitable relief who must do equity. In their Lordships' view however these defendants are not seeking equitable relief, but standing on their beneficial title. No doubt, to perfect their title, they, in strictness, might require conveyances of their shares from the executrix (S. 113 of the Probate and Administration Act not applying). But it is well known that except, perhaps, in the old Presidency towns, such niceties of conveyancing as transfers by executors of shares of lands are not in familiar use, and these appellants can at any rate as defendants rely on their beneficial title.

In their Lordships' view, these three defendants are entitled to succeed, but the first defendant is not so entitled.

Their Lordships will humbly recommend His Majesty that the judgments of the District Judge and of the High Court should be discharged, and that in lieu thereof the plaintiff should have a decree for ejectment against the first and second defendants, and that it be declared that he (the plaintiff) is entitled to one-third and one-quarter of the remaining two-thirds of the property in suit and that

(5) [1995] 19 Bsm. 371.

the third, fourth and fifth defendants are each entitled to one-quarter of the two-thirds, with liberty to the plaintiff or to any one of these last three defendants to apply for a partition; that the plaintiff have judgment against the first defendant for his costs before the District Judge and in the High Court, and against the second defendant for his costs before the District Judge; and that the third, fourth and fifth defendants have their costs in the Courts below and the whole costs of this appeal before their Lordships. Their Lordships do not consider that the joinder of the first defendant has increased the costs of the appeal.

Their Lordships will further recommend that the cause be remitted to the High Court at Rangoon to act in accordance with these directions, with liberty to the parties to apply as they may be advised.

D.D.

Case remitted.

Solicitors for Appellants — *Bramall & Bramall.*

Solicitors for Respondents. — *Waterhouse & Co.*

A. I. R. 1927 Privy Council 156

(From Rangoon)

29th March 1927

VISCOUNT SUMNER AND LORDS ATKINSON AND CARSON

Soniram Jeetmull—Appellants.

v.

R. D. Tata and Company, Ltd.—Respondents.

Privy Council Appeal No. 123 of 1926.

Contract Act, S. 49—Contract silent as to place of payment of liability—Payment should be made where creditor is—Intention of parties to the contract must be seen.

Defendants were sued in Rangoon by Tata Company, Ltd., who had a business branch there, for payment of sums of money, due upon the failure of constituents to satisfy debts due to the latter, which sums the defendants had undertaken to make good to them, but the defendants, who carried on business in Calcutta, contended that they could not be sued for this money in Rangoon. The transactions between these parties were a continuation of dealings which had existed for a number of years and had been carried on under a memorandum, signed in Calcutta. By Cl. 2 of that contract the defendants were to make good any undisputed claims that Tata Co., might lose owing

to the failure or suspension of payment of constituents. The contract did not say anything as to where the defendants were to pay.

Held : that S. 49 does not get rid of inferences, that should justly be drawn from the terms of the contract itself or from the necessities of the case, involving, in the obligation to pay the creditor, the further obligation of finding the creditor so as to pay him. The rule in S. 49 is one which it was intended should apply both to the delivery of goods and to the payment of money to which different considerations apply from those applying in a case like the present where the question is one of jurisdiction.

Held : further that an intention was shown in the contract that payment should be made in Rangoon. Accordingly part of the contract was performable in Rangoon so as to satisfy S. 49 and there was jurisdiction to entertain the suit. [P 158, C 2]

A. M. Dunne and E. B. Raikes—for Appellants.

G. R. Lowndes and K. Preedy — for Respondents.

Viscount Sumner.— This is an appeal by special leave from the High Court of Rangoon, which affirmed a decision of the Court below, overruling an objection to the jurisdiction taken by the appellants. It was imposed upon the parties, as a term of the special leave, that the pleadings between the parties, the judgments and the order of the Court in India should be the sole material for this argument. The appellants were sued in Rangoon by R. D. Tata & Company, Limited, who have a business branch there, for payment of sums of money, due upon the failure of constituents to satisfy debts due to Messrs. Tata, Sons & Company, which sums the defendants had undertaken to make good to them. Judgment had been obtained, and there was no dispute about the amount or validity of these debts or about their being due from the original debtors, but Messrs. Jeetmull, who carry on business in Calcutta, contend that they cannot be sued for this money in Rangoon. The transactions between these parties were a continuation of dealings which had existed for a number of years before the present plaintiffs became an incorporated company and had been carried on under a memorandum dated the 10th December 1911, and signed in Calcutta. It is Cl. 2 of that contract that expresses Messrs. Jeetmull's obligation to pay in the present case, and it says that Messrs. Jeetmull are to make good any undisputed claims that Messrs. Tata & Company might lose owing to the failure

or suspension of payment of constituents. Accordingly, one point only arises, namely, whether the part of this contract relating to payment was performable by Messrs. Jeetmull in Rangoon. If it was, there was jurisdiction in the Court to entertain the suit and the objection of the appellants was rightly overruled.

The point, at first sight, appears to be exceedingly short. It is quite true the contract does not say where Messrs. Jeetmull are to pay, but it does say, by an implication which is indisputable, that that they are to pay Messrs. Tata, Sons & Company, and it follows that they must pay where that firm is. Hence one would think that, upon the face of this contract, not indeed in express terms, but by the clearest implication, payment is to be made in Rangoon. In respect of the whole of this business it is not disputed that the business transactions, out of which the outstanding debts arose, took place in Rangoon, and for this purpose the branch of Messrs. Tata, Sons & Company there were the Messrs. Tata, Sons & Company concerned. It was objected, however, in the High Court of Rangoon, that this constituted an importation of a technical rule of the English Common Law into the jurisprudence of India, namely, the rule that the debtor must seek out the creditor. The simple answer to that would have been that, on the contrary it was a mere implication of the meaning of the parties. The appellants, however, rely upon S. 49 of the Indian Contract Act, which is in these terms :

When a promise is to be performed without application by the promisee and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise and to perform it at such place.

Then it is said that no place was fixed by the contract or prior to the institution of this suit for the performance of the obligation of payment, and no application has been made by the promisor to the promisee to appoint a reasonable place and therefore there is no place of payment. Consequently, this section, which, it is said, replaces any rule of law with regard to the obligation of the debtor to seek out the creditor, has not been satisfied, and so there is no part of the contract, which is performable in Rangoon. The submission seems a strange

one. It is quite certain that, if the application had been made, the place appointed would have been Rangoon, and all would then have been well for the plaintiff. Also it is plain that the section makes it the duty of the promisor to apply for the appointment of a reasonable place, a duty which in this case the promisor has entirely disregarded. It is not easy to reconcile with the ordinary rules of law a construction which enables the promisor to better his position under his contract by neglecting to perform a statutory duty imposed upon him with regard to its performance. The matter, however, is said to be covered by authority in India, and it therefore becomes necessary to consider what the authorities are. They do not appear to bear out the view which has been presented to their Lordships. In 1904, in the case of *Motilal Pratabchand v. Surajmal Joharmal* (1). Mr. Justice Tyabji held that

where no specific contract exists as to the place where the payment of the debt is to be made, it is clear, it is the duty of the debtor to make the payment where the creditor is.

This follows the principle of *Dhunjisha Nusserwanji v. A. B. Fforde* (2), where it was held that

In the absence of stipulation in the contract itself, the intention of the parties to it was to guide the Court in determining the place of its performance,

and upon that principle the suit, which was one relating to leave under Cl. 12 of the Letters Patent, was decided against the jurisdiction of the Bombay Court. Then, shortly after the former of the above cases, in the case of *Puttappa Manjaya v. Virabhadrapa* (3), the High Court of Bombay had the matter before it on appeal. No authority whatever appears to have been cited, but, there being an objection that the Court had no jurisdiction to entertain a creditor's suit for recovery of payment from the debtor, Sir Lawrence Jenkins says :

This argument rests upon the assumption that the Common Law rule applies that a debtor must seek out his creditor. We think, however, in India the rule as to the place of performance, whether it be payment or any other mode of performance, is to be determined by S. 49 of the Contract Act; and applying that section to the facts of this case, we think, it is impossible to hold that the payment was to be made within the limits of the jurisdiction of the

Sirsi Court, for no such application has been made or place fixed as S. 49 prescribes. Therefore we are of opinion that the Sirsi Court had no jurisdiction.

What the contract precisely was does not appear, but the suit was to recover any balance that might be found due on taking accounts with interest, and the facts of that case differ from the facts of such a case as the present. Finally, this Board had the matter before it in 1925, in *Bansilal Abirchand v. Ghulam Mahtub Khan* (4) and there, the English rule having been urged in terms upon their Lordships on the one side, and *Puttappa's* case (3) on the other, Lord Blanesburgh for the Board says :

There is no promise either by the principal debtor or the surety to make any payment at Secunderabad, and, so far as the principal debtor is concerned, the bond above abstracted is the only promise on his part which is forthcoming. It is quite true that, on failure of any instalment, there is doubtless an implied promise by him to repay the loan. But there is no implied promise to repay it at Secunderabad. Even by British law the duty of a debtor to find and pay his creditor is only imposed upon him when the creditor is within the realm. And the plaintiff has not contended that if there be any such duty at all imposed by Indian law upon a debtor, it extends in this respect further than in England. Accordingly, so far as the principal debtor is concerned, there is no obligation upon him either express or implied to make any payment to the plaintiff at Secunderabad.

Their Lordships do not think that in this state of the authorities it is possible to accede to the present contention that S. 49 of the Indian Contract Act gets rid of inferences, that should justly be drawn from the terms of the contract itself or from the necessities of the case, involving in the obligation to pay the creditor the further obligation of finding the creditor so as to pay him. The rule in S. 49 is one which it was intended should apply both to the delivery of goods and to the payment of money, to which obviously different considerations apply from those applying in a case like the present, where the question is one of jurisdiction, and their Lordships are satisfied that an intention is shown in the contract that payment should be made in Rangoon. Accordingly, part of the contract was performable in Rangoon so as to satisfy S. 49 of the Indian Contract Act, and there was jurisdiction to entertain the suit.

(1) [1906] 30 Bom. 167=6 Bom. L. R. 1038.

(2) [1887] 11 Bom. 649.

(3) [1905] 7 Bom. L. R. 993.

(4) A. I. R. 1925 P. C. 290=53 Cal. 88=53 I. A. 58 (P. C.).

Their Lordships will humbly advise His Majesty accordingly that this appeal should be dismissed with costs.

G.B. *Appeal dismissed.*

Solicitors for Appellants—*Bramall and Bramall.*

Solicitors for Respondents—*Stoneham & Sons.*

A. I. R. 1927 Privy Council 159

(From Calcutta: A. I. R. 1925 Cal. 116)

3rd May 1927

VISCOUNT DUNEDIN, LORDS PHILLIMORE
AND WARRINGTON AND SIR JOHN
WALLIS AND SIR LANCELOT
SANDERSON.

Sri Protap Chandra Deo Dhabal Deb—
Appellant.

v.

Raja Jagadish Chandra Deo Dhabal Deb—Respondent.

Privy Council Appeal No. 59 of 1925:
Calcutta Appeals Nos. 20 of 1924 and
13-15 of 1925.

(a) *Hindu Law—Impartible estate is alienable in the absence of a custom to the contrary—Burden is on person alleging such custom—Absence of alienation in respect of an estate is no proof of such custom.*

The general rule is that an impartible Raj is alienable by will as well as inter vivos as the title to prevent alienation rests upon the present co-ownership of the person who wishes to retain it, but in the case of an impartible Raj, such present co-ownership does not exist, inasmuch as it is so connected with the right to partition that, where that right does not exist, present co-ownership falls with it. But this general rule might be displaced by proof of a family or local custom restricting alienation, the onus of proving such custom being cast upon the person who alleges it. [P 160 C 1, 2]

That there had been no instance of a will purporting to dispose of a particular impartible estate is no proof of a custom of inalienability in respect of that estate. [P 160 C 2]

(b) *Hindu Law—Impartible estate—Alienability—Estate held as ordinary zamindari for upwards of a century—Ancient nature of zamindari has no bearing.*

In a case where for upwards of a century there has been nothing military or feudal in the tenure and the estate has been an ordinary zamindari, no inalienability can result from the ancient nature of the tenure. [P 161 C 1]

(c) *Hindu Law—Impartible estate—Maintenance to junior members.*

A member is not entitled to maintenance from an impartible estate unless he establishes a

right to maintenance by custom or relationship or in any other way: 45 I. A. 148 and A. I. R. 1921 P. C. 62, Rel. on. [P 161 C 2]

A. M. Dunne, George Loundes and S. Hyam—for Appellant.

L. DeGruyther and B. Dube—for Respondent.

Lord Warrington.—The subject-matter of the present appeal is a family estate known as the Dhalbhum Raj, situate in the districts of Singhbhum and Midnapur, in the province of Bengal.

The family is a joint and undivided one, governed by the Mitakshara school of Hindu law. The estate is ancestral, and succession to it is governed by a family custom according to the rule of lineal primogeniture. The Raj is impartible. The last holder of the estate prior to the present dispute was Raja Satrugna, who, in 1837, succeeded to it on the death of Raja Ram Chandra III.

On the 11th May 1905, Raja Satrugna made a will, whereby he appointed the respondent executor, and bequeathed the estate to him and declared him to be the next Raja. Probate of the will has been duly granted to the respondent. It is admitted that, if the will had not been made or is inoperative, the appellant, according to the rule of lineal primogeniture, is the next heir, and as such is entitled to succeed to the estate.

The main question in the appeal is whether the estate is inalienable by will.

In both Courts in India, first by the Subordinate Judge of the district of Midnapur, and on appeal by the Judges of the High Court of Judicature of Bengal, this question has been answered in the negative, and the title of the respondent has thus been upheld.

Both Courts in India have held that the question is settled by decisions of this Board. Their Lordships agree with this view, and it will be sufficient for the purposes of the present judgment shortly to state the nature and effect of the previous decisions referred to.

The question of the alienability of an impartible Raj first came before the Board in the case of *Sartaj Kuari v. Deoraj Kuari* (1), on appeal from Allahabad. The question in that case was as to the validity of a gift inter vivos of part of an impartible estate made by the

(1) [1888] 10 All. 272=15 I. A. 51=5 Sar. 139 (P. C.).

owner for the time being in favour of his younger wife. The validity of the gift was disputed by his son by the first wife, who contended that the owner had no power to alienate any part of the Raj estate except for purposes of necessity. The Board, by its judgment, delivered by Sir Richard Couch, held that the gift in question was valid on the ground that the title to prevent alienation rests upon the present co-ownership of the person who wishes to retain it, and that in the case of an impartible Raj such present co-ownership does not exist, inasmuch as it is so connected with the right to partition that, where the right does not exist, present co-ownership falls with it.

This case was decided in the year 1888.

The next case was the first *Pittapur* case [*Venkata Surya Mahipati v. Court of Wards* (2)], decided in the year 1899. The question in this case was whether the Raj was alienable by will. The judgment of the Board decided two points: (1) that the *Sartaj Kuari* case (1) covered by analogy the case of alienation by will, and (2) that the law laid down thereby applied in Madras and was not confined to the North-West Provinces in which the case arose. The Board, therefore, not only followed their previous decision, but extended it so as to make it apply to alienation by will as well as to alienation inter vivos.

In the opinion of their Lordships, they ought to accept and act upon these decisions, unless it could be shown that they are inconsistent with other decisions of the Board, or that some principle of law demanding a contrary decision was clearly ignored or forgotten.

Accordingly, a strenuous attack on the two judgments was made by counsel, which really resolved itself into the contention that they were inconsistent with judgments of the Board dealing with the right of succession, in which it had been held that such right is not affected by the impartible nature of the Raj. It was argued that the co-ownership, the existence of which was denied in the two cases in question, is essential to the right of succession, and accordingly that the two lines of decision are inconsistent with each other, and that it is open to

their Lordships to choose between the two.

Their Lordships are unable to adopt this view. The last of the cases on the question of succession is *Bajinath Prashad Singh v. Tej Bali Singh* (3). In delivering the judgment of the Board, Lord Dunedin, referring to the *Sartaj Kuari* case (1), said:

What was decided was that in an impartible Raj there was no restriction on the power of alienation of the member of the family who was on the Gaddi and was in possession in respect that there was no such right of co-ownership in the other members as to give them a title to prevent such alienation. The right of the other members that was being considered was a presently existing right. The chance which each member might have of a succession emerging in his favour was, obviously, outside the sphere of inquiry.

The Board refused in terms to pronounce an opinion that the decision in the *Sartaj Kuari* case (1) was wrong, though they pointed out that it would have been possible to decide the case differently.

If the theory had been accepted that impartibility being a creature of custom though incompatible with the right of partition yet left the general law of the inalienability by the head of the family for other than necessary causes without the consent of the other members as it was.

In the opinion of their Lordships the judgment last referred to is fatal to the contention that the *Sartaj Kuari* case (1) and the *Pittapur* case (2) are inconsistent with those on the right of succession, and they must hold that no ground has been established for a refusal on their part to follow the decisions in those two cases.

But it was recognised in both those cases that the general rule thus established might be displaced by proof of a family local custom restricting alienation, the onus of proving such custom being cast upon the person who alleges it, and accordingly an attempt was made in the present case to prove such a custom. In both Courts in India the attempt failed, and, in their Lordships' opinion, no ground has been shown for reversing their findings in this respect.

Only two items of evidence were really relied upon in argument: (1) that there had been no instance of a will purporting to dispose of the estate and (2) a statement by Satrugna himself

(2) [1899] 22 Mad. 383=26 I. A. 83=7 Sar. 481 (P.C.).

(3) A. I. R. 1921 P. C. 62=43 All. 228=48 I. A. 195 (P. C.).

that a previous Raja Ram Chandra III had no right to make a will.

As to the first item, the mere absence of any will is an equivocal circumstance. It might be attributable to an assumption on the part of the several Rajas that the law did not admit of a bequest of the Raj, or to the absence of any desire on their part so to dispose of the Raj. It cannot, in their Lordships' opinion, be by itself sufficient evidence of the alleged custom.

As to the second, when it is examined, it will be found that it is a statement, not on oath, but made by way of pleading in proceedings in which Satrughna was disputing an alleged will of his predecessor and taking every possible objection to its validity, and was, therefore a statement made in what he then considered to be his interest. Moreover, it is by no means clear that the statement was intended to be based on a family custom at all (see the passage in the judgment of the High Court, p. 24, line 17, and following).

The alleged custom varying the rule laid down in the cases above referred to has, in their Lordships' opinion, not been proved, and the rule itself must, therefore apply.

One other point made by the appellant remains to be noticed. In his case the point is raised in paragraph 6 of the Reasons, which reads as follows :

Because the nature of the estate, being originally a Raj or principality and not being affected or altered by permanent settlement, renders it inalienable.

In the judgment of the High Court it is stated that in the Court below counsel for the defendant conceded that

he could not press the contention that the estate was inalienable on account of its being one of military or feudal nature (Record II, page 46, line 37),

but the Court nevertheless dealt with the point and overruled the appellant's contention. They pointed out that the grant of the estate under the first settlement of 1777 was on the usual conditions on which grants to zemindars were made. There was nothing feudal or military in it. Their Lordships agree with the High Court that in the present case, inasmuch as for upwards of a century there has been nothing military or feudal in the tenure and the estate has been an ordinary zemindari, no inalien-

ability can result from the ancient nature of the tenure.

On the whole, their Lordships are of opinion that the main appeal fails, and ought to be dismissed with costs, and will humbly advise His Majesty accordingly.

There remain the cross-appeals of the respondent.

These are three in number :

First, the respondent (the plaintiff in the suit) raises objections to the provisions in the decree of the Subordinate Judge, as affirmed by the High Court dealing with his claim for repayment by the appellant (the defendant in the suit) of moneys received by him by way of maintenance while the estate was in the charge of the Court of Wards after the death of Satrughna and with the costs of the suit and of the appeal to the High Court.

Secondly, he appeals from an order of the High Court, dated the 28th July 1924 continuing, pending this appeal, the appointment of a Receiver already appointed by the Court pending the appeal to itself.

Thirdly, he appeals from a further order of the High Court, dated the 13th August 1924 directing the receiver to pay to the appellant the sum of Rs. 1,200 per mensem by way of maintenance pending this appeal.

While the estate was in the charge of the Court of Wards the appellant received the sum of Rs. 27,000 by way of maintenance, being three payments of Rs. 9,000 per annum. The respondent claimed repayment of this sum from the appellant by way of mesne profits. This claim was allowed by the decree, but on the sole ground that the appellant had no means to pay the mesne profits and the costs, it was directed that the respondent should realise the same from the estate and the appellant should not be personally liable.

In the opinion of their Lordships, the appellant was not entitled to maintenance out of the estate—First, on the ground that the maintenance of himself and his family was already provided for by a khorposh grant of certain villages to his predecessors, which villages are still in his possession ; and, secondly, because he has failed to establish a right to maintenance by custom or relationship or in any other way : See the second Pittapur case, *Raja Rama Rao v.*

Raja of Pittapur (4). This being so, and the respondent being thus entitled to receive back what had been wrongfully paid, it is difficult to understand why this burden should be thrown on the estate, which as the result of the suit had been recovered from the appellant. The same remark applies to the costs. The respondent may not be able to recover the money owing to the poverty of the appellant, but this is no reason why an order for payment should not be made.

Their Lordships will therefore humbly advise His Majesty that the first cross-appeal should be allowed with costs and the decree of the High Court varied by directing the appellant to pay the Rs. 27,000 and the costs of the suit and of the appeal to the High Court.

As to the second and third cross-appeals, if the appellant is not entitled to maintenance, their Lordships fail to see why he should have received anything pending the litigation. They will therefore humbly advise His Majesty that these appeals also should be allowed with costs, and that the two orders of the 28th July 1924, and the 13th August 1924 should be set aside and the appellant be directed to repay to the respondent the sums paid by him thereunder. The setting aside of the order of the 28th July 1924 should be without prejudice to the liability of the Receiver to account.

G.B.

*Appeal dismissed,
Cross-appeals allowed.*

Solicitors for Appellant — *Barrow, Rogers & Nevill.*

Solicitors for Respondent — *Watkins & Hunter.*

(4) [1918] 41 Mad. 778=47 I. C. 354=45 I. A. 148 (P. C.).

A. I. R. 1927 Privy Council 162

(From Calcutta)

5th May 1927

VISCOUNT HALDANE AND LORDS
SHAW AND WARRINGTON

Sasti Kinkar Banerjee—Appellant.

v.

Hursookdas Chogemull—Respondent.

Privy Council Appeal No. 73 of 1926:
Bengal Appeal No. 39 of 1925.

Presidency Towns Insolvency Act (1909), S. 22—Insolvency proceedings pending in Birbhum Court—Calcutta Court in its discretion starting insolvency proceedings against the same person—Calcutta Court has jurisdiction to so start and Privy Council would not interfere with its discretion.

On the 6th August 1924 the appellant was adjudicated insolvent by the Court of Birbhum. On the 15th September the respondent firm filed a petition in the High Court of Calcutta on the Original Side in Insolvency Jurisdiction, making a claim to money. On the 17th March 1925 the High Court in its Insolvency Jurisdiction treated itself as having jurisdiction and made an order adjudicating the appellant insolvent. The appellant objected that having regard to S. 22 it was wrong to make the order that was made at Calcutta. It was suspected that the proceedings at Birbhum were not proceedings which were in the interest of the creditors and that it was better that the jurisdiction should be exercised by the Calcutta High Court and accordingly the High Court Judge exercised his jurisdiction, and on appeal to the Court of appeal, the view taken by him was affirmed.

Held: that the Court had a discretion; it had jurisdiction, but might have had, at a subsequent stage, to restrain the exercise of that jurisdiction in any way which the circumstances required and the circumstances, in the opinion of the Court below, did not require that the jurisdiction should be restrained and therefore the Privy Council would not interfere with the discretion so exercised. [P 162, C 2; P 163, C 1, 2]

J. M. Parikh—for Appellant.

Kenworthy Brown—for Respondent.

Viscount Haldane.—In this case the only real question is whether the High Court had jurisdiction to make the order that was made at Calcutta, adjudicating the insolvent. The history of the case is that on the 6th August 1924, the appellant was adjudicated insolvent by the Court of the District Judge of Birbhum. Then on the 15th September the respondent firm filed a petition in the High Court of Calcutta on the Original Side in Insolvency Jurisdiction, making a claim to money, and that was supported by an affidavit. Some controversy was at first raised by the appellant on this matter, and it was alleged that the High Court had no jurisdiction. On the 17th March 1925, the High Court in its Insolvency Jurisdiction treated itself as having jurisdiction and made an order adjudicating the appellant insolvent. Then there was an appeal to the High Court and the High Court agreed with the learned Judge, who decided for insolvency, and held that he was acting under his jurisdiction in accepting, upon the petition

which was verified by affidavit, that the acts of insolvency against the debtor had been established and that the Court was not hampered by the proceedings in the other Court. Then leave to appeal was given and the appellant comes here.

What the appellant says is this. He does not dispute the jurisdiction which arises under the Insolvency (Presidency Towns) Act, 1909, but he says that, having regard to S. 22 of that Act, it was wrong to make the order that was made at Calcutta. S. 22 is in these terms:

Where it is proved to the satisfaction of the Court that insolvency proceedings are pending in any other British Court within or without British India against the same debtor and that the property of the debtor can be more conveniently distributed by such other Court, the Court may annul the adjudication or may stay all proceedings thereon.

Their Lordships think that makes it quite clear that the High Court in Calcutta had power to stop these proceedings and to say it is more convenient that matters should go on at Birbhum; but there seems to have been some suspicion that the proceedings at Birbhum were not proceedings which were in the best interest of the creditors and that it was better that the jurisdiction should be exercised by the High Court, and accordingly the High Court Judge exercised his jurisdiction, and, on appeal to the Court of Appeal, the view taken by Mr. Justice Buckland in so deciding the case was affirmed.

The judgment of the Court of Appeal, so far as it is material to refer to it, said this:

From the minutes it appears that it was not contended that the Court had no jurisdiction to make the order prayed for, and it also appears from the minutes that the matter that was argued was that inasmuch as there had been an adjudication in Birbhum this Court should not make a further adjudication order in Calcutta. From the minutes it also appears that the learned Judge held that the adjudication order in Birbhum did not interfere with his jurisdiction to make the adjudication order in this Court, and he stated that it was open to any party to make such an application as he might be advised to make under the provisions of S. 22 of the Presidency Insolvency Act—which is the section quoted above—for a stay of proceedings.

Then the judgment of the Court of Appeal goes on to say that counsel who conducted the case in the lower Court on behalf of the insolvent, on being asked by them the question, expressly stated that he did not desire to raise the contention urged in the affidavit with regard

to the jurisdiction of the Court to deal with the matter, having regard to the place of residence and business of the debtor, thus clearly showing that the debtor was treated as being within the ambit of the insolvency jurisdiction of the Calcutta Court.

The whole point, therefore, became this: There being this order in the first Court, there should not be a further order in the other Court; but the Court of Appeal is of opinion that in the circumstances

the learned Judge had authority in his discretion, notwithstanding the previous adjudication in Birbhum, to make an adjudication here, and that he exercised a discretion in making such an order, which is not a discretion which should be interfered with by a Court of Appeal. After all, as the learned Judge has pointed out, it was open to any party who so desired, notwithstanding the fact that an adjudication order had been made, on proper materials to satisfy the Court that the proceedings in Calcutta should be stayed, having regard to the insolvency proceedings that were going on in the Court at Birbhum. The result is that there is no substance in this appeal or in the argument by which it is sought to support the appeal.

Their Lordships take the same view as the Court of Appeal. They think that, for the reasons given by the learned Judges there, and having regard to the language of S. 22, there is no substance in the point that is now made. The Court had a discretion, it had jurisdiction, but might have had, at a subsequent stage, to restrain the exercise of that jurisdiction in any way which the circumstances required. The circumstances, in the opinion of the Court below, did not require that the jurisdiction should be restrained, and their Lordships can well understand that the Court below was justified in its refusal. In any event, their Lordships do not propose to interfere with the discretion so exercised.

The result is that the appeal fails, and must be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

D.D.

Appeal dismissed.

Solicitors for Appellant—*Chapman, Walker and Shepherd.*

Solicitors for Respondent—*Oswald Hickson, Collier & Co.*

A. I. R. 1927 Privy Council 164

(From Sind)

5th May 1927

VISCOUNT SUMNER, LORDS SINHA
AND BLANESBURGH, AND SIR
JOHN WALLIS

*The firm of Saleh Mahomed Umer Dos-
sal—Appellants.*

v.

*Seth Nathoomal Kessamal — Respon-
dent.*

Privy Council Appeal No. 7 of 1926.

*Civil P. C., Sch. 2, para. 15 — Error on the
face of award — Mistake in construing contract
referred to in award but not incorporated in it
is not.*

Where the arbitrator considered all the evi-
dence, documents and accounts before him and
the arguments of the pleaders, and then made
the award,

Held : a mere error in construing a contract
between the parties which is referred to in the
award simply to earmark the origin of dispute in
question between the parties cannot be said to be
an error in law on the face of the award.

[P 164 C 2 ; P 165 C 1]

*G. R. Lowndes and E. B. Raikes—for
Appellants.*

Viscount Sumner.—In this case as
the respondent did not appear their
Lordships with the very full assistance
of counsel for the appellants have ex-
amined it with, as they believe, every
care to see whether there is any irregu-
larity, or other matter than that which
has been fully argued, to which their
attention ought to be directed, but they
are satisfied that the only question which
can reasonably be raised is whether the
Court of the Judicial Commissioner, from
which the appeal comes, were or were
not right in their decision that the award
made in the arbitration between the
present parties was bad on its face.
Though it was no part of the proceeding
now before the Board, it is the case that
after the issue was decided, that is now
under appeal, the present appellants
applied to have it reviewed, and on that
occasion one of the members of the Court,
whose judgment is under appeal, said,
in refusing the application :

It may be admitted for the present purpose,
that our decision proceeded largely on the same
grounds as those that commended themselves to
the High Court of Bombay in *Jhraj Baloo Splin-
ning and Weaving Co. Ltd. v. Champsey Bhara
and Co. (1)*. Those grounds did not commend

(1) [1919] 44 Bom. 780=53 I. C. 799=21 Bom.
L. R. 1037.

themselves to their Lordships of the Privy Coun-
cil, and the judgment of the High Court of
Bombay was reversed. That judgment of their
Lordships of the Privy Council was delivered on
the 6th March 1928, and at the time we heard
the revisional application in question it had not
reached India. It may be assumed for present
purposes that, had that judgment been placed
before us at the hearing our judgment would
not have proceeded on the lines on which it did
proceed.

It is therefore perfectly plain, that the
one point which was in dispute in the
Court below was, whether or not under
the circumstances of the case there could
be said to be an error upon the face of
the award, which had been brought
before them by the regular process of
objection on the part of one of the parties
to the award, when filed.

The contract is referred to in the
award. It recites a contract made bet-
ween the parties dated the 1st December
1919, but it does so for one purpose only,
namely, to earmark the disputes, which
had arisen and which, by a subsequent
written reference, had been referred first
to the arbitration of two named arbitra-
tors, and then, in the event which hap-
pened, of the umpire, who made the
award when they differed. The umpire
recited that both parties were present on
every occasion when he sat ; that he con-
sidered all the evidence, documents and
accounts before him and the arguments of
the pleaders, and then made the award.
Paragraph 1 of his award adjudged that
one party should pay a named sum with
interest at a fixed rate, and from dates
which were fixed also and then with the
costs of the arbitration. Para. 2 stated
that on receipt of these amounts the
other party should forthwith deliver
certain goods, which were precisely
specified. Para. 3 provided for a right
to require payment of storage charges,
if there was delay in taking delivery,
and the amount of the arbitration costs
was then specified as well. There was
also a clause, which stated that in addi-
tion to these costs, all costs, if any,
incurred in filing the award in Court
should be paid. That clause is a sever-
able matter and was treated by the first
Judge as a mere indication of opinion for
his guidance and not as part of the
award, and when afterwards the award
came to be questioned before the full
Court, no exception was taken to his
decision on this ground, which therefore
stands. The exception taken to his deci-

sion simply had reference to specific objections and left the award in other respects standing. It was that the umpire had been guilty of that particular form of judicial misconduct, which consists in making a mistake in law, and letting it be visible on the face of his award. The argument was that the contract was incorporated into the award by the reference mentioned above, and that, adopting the parties' admission that the bales tendered were of substantially less weight than the bales, whose deliverable weight was specified in the contract, the award must be taken to have disclosed on its face an error in law in construing the terms of the contract, which related to the description of the goods sold and to the law applicable to the sale and delivery of goods by description. Their Lordships, independently of the case of *Jivraj Balloo Spinning and Weaving Co. Ltd. v. Champsey Bhara and Co.* (2), could not have entertained that view, because it appears to them quite plain that this award, the terms of which are very precisely stated, makes its allusion to the contract very guardedly and for the purpose only of earmarking the origin of the dispute in question. It is perfectly consistent with the umpire's having come to conclusions of law or of fact of his own, by which the parties who submitted their disputes to him would be bound. On looking at the previous decision of the Board, however, it may be observed that that was a stronger case than the present one, because in that case there had been a rejection of the goods altogether, a fact which was referred to in the award. By this and other exceptional references to the contracts, the award incorporated their written terms, and the rules and regulations, subject to which they were made; and the letters between the parties, stating the grounds on which the goods were rejected, were also mentioned and included. It then proceeded to state how the arbitrators got at their conclusion. On these facts the decision of the Board was that there was nothing that could be called error upon the face of the award, and therefore, the appeal succeeded. A fortiori this appeal must succeed also.

Their Lordships think it unnecessary to canvass the case any further. They will humbly advise His Majesty that the appeal be allowed with costs, and the decision of the first Judge be restored.

G.B.

Appeal allowed.

Solicitors for Appellants—*Watkins & Hunter.*

* * A. I. R. 1927 Privy Council 165

(From Oudh : A. I. R. 1924 Oudh 442 : see also A. I. R. 1927 Oudh 224)

17th May 1927

LORDS PHILLIMORE, SINHA, BLANESBURGH, AND SIR JOHN WALLIS AND SIR LANCELOT SANDERSON

Indar Prasad and another—Appellants.

v.

Jagmohan Das and another—Respts.

Privy Council Appeal No. 84 of 1925
Oudh Appeal No. 10 of 1924.

* * (a) *Oaths Act, S. 8*—Neither invocation nor oath or affirmation is necessary—Oath under S. 8 is different from one under S. 5—For an oath under S. 8, no preliminary oath under S. 5 is necessary—Oath under S. 8 is not dependent on any discretion of Court.

Upon a sound construction of the Ss. 8, 9 and 10, neither an invocation nor an oath or affirmation in the technical sense of these words is in any way an essential part of the so-called oath or solemn affirmation referred to in S. 8 of the Act. [P 170, O 2]

The "oath or solemn affirmation" referred to in S. 8 and following sections is something quite distinct from the oaths and affirmations referred to in S. 5. These are to be in such form as the High Court shall prescribe (S. 7). With regard to the oath or solemn affirmation referred to in S. 8, however, all that is said is that it may be "in any form common amongst or held binding by persons of the race or persuasion to which (the deponent) belongs, and not repugnant to justice or decency." That is to say, it may be as infinite, alike in form and content, as racial custom or the dictates of any religious persuasion may, within the prescribed limits sanctioned or require. But from its very nature and essence it can never be in any part of it dependent upon the direction or dictation of the High Court or of any other extra racial or secular administrative authority. It would or might at once lose its essential distinctive sanction if any such outside interference were permitted to have effect. There is no suggestion either in Ss. 8, 9 or 10 that when the separate "oath or solemn affirmation" is permitted the ordinary oath or affirmation, as prescribed, or any part of it, is to be administered as well. The "oath or solemn affirmation" when permitted is a complete substitute for the other. [P 170, O 2]

* * (b) *Oaths Act, S. 8*—"Oath and solemn affirmation"—Significance explained.

The use of the alternative expression "oath" and "solemn affirmation" as a description of

(2) A. I. R. 1923 P. C. 66=47 Bom. 578=50 I. A. 324=(1923) A. C. 480 (P.C.).

the special ritual envisaged in S. 8, is intended to indicate that the ritual is to be at least as solemn for the deponent and attended by the same consequences to him as is an ordinary oath or affirmation for and to an ordinary witness. The words were selected primarily to put it beyond the possibility of doubt that the temporal consequences of corrupt falsehood would follow as inevitably for the one class of witness as for the other; they are descriptive of the nature and result of the ritual; they are in no way concerned with its form; *A. I. R. 1924 Oudh 442, Affirmed.* [P 171 C 2]

L. DeGruyther and *S. Hyam* — for Appellants.

A. M. Dunne and *B. Dube* — for Respondents.

Lord Blanesburgh.—This appeal arises out of a partition suit which has been pending in the Court of the Subordinate Judge of Lucknow for a period of nearly 12 years. The plaintiffs and defendants are, in each case, father and son, all members of a Hindu family governed by the Mitakshara School of Hindu law and at one time joint. The first plaintiff is the elder brother of the first defendant. The sons, being both of them infants during the greater part of the critical period, do not, except for one incident concerning the second plaintiff, enter into the story. It will be convenient, therefore, frequently throughout this judgment to refer to the respective fathers as if they represented the entire interest on either side. When their Lordships refer to them as plaintiff or defendant they will do so in this sense.

The family owned property, both moveable and immoveable, of considerable extent and value, including a banking and pawnbroking business. Some time in 1914 the first plaintiff left the family house, not, as has been found, on account of any differences with the first defendant, but because of illness. Subsequently, however, differences arose between the brothers, so acute that the resumption of joint residence was apparently regarded by both as impracticable. It was in these circumstances that this suit for the partition of the entire family property, including that relating to the business, was commenced on the 23rd September, 1915. It has been proceeding ever since.

To the plaint are attached lists, particularizing the properties to be partitioned. These included the immoveable properties, the debts due and

the gold and silver ornaments pledged to the firm, together with brass and silver articles and other movables in possession of the parties.

In the plaint it is also alleged that in kothris, in the family dwelling-house, there had been locked up by the first defendant joint property in the shape of jewellery and cash, and also ornaments pledged to the firm. These articles the plaintiff could not completely specify, but he claimed that with any other joint property later discovered they should be included in the suit. The existence or non-existence of this property so referred to is the dispute which has mainly led to the altogether inordinate prolongation of the proceedings.

At first it seemed that there would be no serious difference on any question.

On the 31st January, 1916, there were filed in Court two petitions for compromise, intimating the intention of the brothers to partition the immoveable property amicably out of Court, and praying that a commissioner of partition should be appointed to divide the movables. On that day a preliminary decree of partition was made. Peace was in the air, and so far as the immoveable properties were concerned it has not been broken. These were shortly afterwards duly partitioned by mutual agreement, and no further question arises with reference to them.

But with regard to the moveable property disputes were resumed and became highly embittered. The first defendant denied possession of any such further property as had been referred to in the plaint, and contested many payments alleged by the plaintiff to have been made on the joint account. The proceedings before the Commissioner were interrupted by proceedings in Court; there were several interlocutory orders; some of these were carried to appeal. The first plaintiff was examined and cross-examined in Court for nine days; the first defendant, called by the plaintiff, for 33 days. On the 6th May, 1921, the learned Subordinate Judge delivered a judgment in which, in a sense very unfavourable to the first defendant, he reviewed the history of the protracted litigation up to that date. The first defendant, he found, was in possession of and had not discovered moveable properties of very consider-

able value, and he made an order in the following terms:

I, therefore, order that the Commissioners will find out from the statements of [the first plaintiff] and his wife the special items of properties and their value. Any property on which the Commissioners can identically lay their hands will be taken in possession by them. The value of such property will be determined from the evidence of the first plaintiff and his wife already on the record and by obtaining expert opinion if necessary. Such of the properties as are not forthcoming will be valued so far as possible from the evidence contained in the statements of [the first plaintiff and his wife]. The value of them to the extent of the plaintiffs' share shall be debited against the share of the defendants to be arrived at as a result of the partition of the entire property which is the subject of the suit.

This was, of course, an order which in an evidentiary sense if their Lordships may be permitted such an expression, was highly favourable to the plaintiff, and the defendant appealed against it to the Court of the Judicial Commissioner, but on the 29th August, 1921, his appeal was dismissed as incompetent at that stage. The proceedings accordingly continued on the basis of the order appealed from. Lists and counter-lists were exchanged between the parties; the first plaintiff was further cross-examined for four days between the 28th February, 1922 and the 4th March, 1922, and, as a result of it all, the first plaintiff and first defendant on the 16th March, 1922, appeared before the Subordinate Judge and made the following statements, which were duly recorded by the Judge. The defendant, Jagmohan Das, said:

Whatever lists Indar Prasad (plaintiff) gives written with his own hand of the village collections, house rents and other accounts, including Ugahi, I shall accept as true and correct. And I shall admit whatever moveables with their value he says upon his belief remained with me.

The plaintiff, Indar Prasad, said:

I shall give written with my own hand to Lala Jagmohan Das whatever the accounts are including village collections, house rents, Ugahi account, etc., and I shall write with my own hand and verify upon my belief, a list of moveables with their value that remained with Lala Jagmohan Das.

In pursuance of that agreement the first plaintiff, on the 30th March, 1922, filed seven lists, of which six only remain material. These six were all in his handwriting. With the exception of the immovable property, as to which the dispute was ended, they covered the whole range of the suit. If they were conclusive, as by the agreement of the

defendant they were to be, they would have secured for the plaintiff a decree for practically the whole of his claim and there would have been due to him from the defendant a sum exceeding two lakhs of rupees.

But, then, a strange thing happened. For some reason unknown—the Subordinate Judge describes it as "a fit of responsive generosity" on the part of the first plaintiff, he on the 30th March, 1922, when filing his lists, made in Court in the presence of the first defendant, the officer on which everything now turns. It is thus recorded by the Subordinate Judge:

Lala Indar Prasad says he will give up out of his lists such items as Jagmohan Das denies before the Deity Lachmi Narsinghi. Jagmohan Das accepts this.

It would appear that, unexpected though the first plaintiff's offer must have been, the first defendant was not slow to see the advantage which this agreement gave him, and a few days later he took a further step to make it completely effective. The first plaintiff's son and co-plaintiff had recently attained majority, and on the 4th April, 1922, the first defendant applied that it should be placed on record whether he also relied or not on the special oath of the first defendant. On the 7th of April the young man appeared in Court. He had already intimated that he too, rested the matter on the special oath of the first defendant as his father, the first plaintiff, had done and he replied to the learned Judge, who explained the whole position to him, that he was willing it should be so, even if the first defendant struck out all the items claimed by the plaintiff. "Now," comments the Judge, "both the plaintiffs were within the eagle claws of the Defendant No. 1."

On the 8th April, 1922, the Commissioner, appointed by the Judge in terms to be referred to later, went to the plaintiff's house, and in a kothri of the family deities and in the presence of the Dibba known as Lachmi Narsinghia Dibba he recorded the admissions and denials by the defendant Jagmohan Das of the items in the lists filed by the plaintiff.

On the 10th of April the Commissioner submitted to the Court his report of the proceedings, together with the first

defendant's recorded statement. Plaintiff No. 2 had indeed been taken at his word. By admitting, as the Judicial Commissioners put it, practically all the items which involved any liability on the part of the first plaintiff, and denying practically all the items which involved any liability on his own, the first defendant had transformed lists which disclosed an indebtedness of over two lakhs from him to the plaintiff into a bill ultimately adjusted at Rs. 93,672-15-3 due by the plaintiff to himself and his son.

The plaintiff, now thoroughly alarmed, on the 11th April, protested to the Subordinate Judge that the proceedings of the 30th March, 1922, and anything done thereunder, were not warranted by the Indian Oaths Act No. 10 of 1873: that the first plaintiff's offer of that day was vague and indefinite in its wording and did not contemplate a total denial of some of the lists as recorded by the Commissioner; that the denial by the first defendant of the possession of any joint family property—this he had done—was opposed to the Court's finding in its judgment of the 6th May, 1921, and that the denials showed that the first defendant had taken undue advantage of the offer of the first plaintiff, and that the Court should not consider the result to be binding and conclusive on the plaintiff.

After a full hearing the learned Subordinate Judge, on the 22nd May, 1922, declared that the admissions and denials of the first defendant recorded in the presence of the deity Lachmi Narsinghi stood good, and he directed the Commissioner to make a report of the net result of all that had gone before. This report the Commissioner made on the 6th July, 1922, and thereon a final decree was passed on the 25th July 1922, awarding as to the moveables to the defendant the above sum of Rs. 93,672-15-3 with future interest on that amount from decree until realization. The plaintiff appealed to the Court of the Judicial Commissioner, which by its judgment of the 10th March 1924, upheld the decree of the Subordinate Judge. The plaintiff's present appeal is from that judgment.

Their Lordships have been at pains to set forth in some detail the facts which have led to the existing situation. They

recognize that the appellants, by their own act, have completely thrown away the favourable position which in this litigation they had obtained for themselves by the order of the 6th May 1921—a position which may well have induced the first respondent's concessions of the 16th March 1922. Accordingly their Lordships have thought it right before proceeding further with the consideration of this appeal, to assure themselves that the appellants had, to the full extent alleged, become bound by the agreement of the 30th March 1922.

Their Lordships were, in the light of the earlier proceedings in the suit, particularly struck by one feature of that agreement as interpreted by the Courts in India. As so interpreted it binds the plaintiff by the special oath of the first defendant, not only to matters which were directly within the first defendant's own knowledge—for example, as to the jewellery, cash and ornaments retained by him—but even to matters immediately within the knowledge of the first plaintiff and testified to by himself, and only at second hand, if at all, within the knowledge of the first defendant. To their Lordships' minds this seems in the circumstances, a strange arrangement for the first plaintiff to have offered the first defendant, and they have scrutinized very narrowly the terms of the recorded agreement to see whether such is its effect, or whether it could not fairly be interpreted as directed, for example, to the plaintiff's list numbered 1, which comprised the property of the first-class, and as excluding, for example, list numbered 3, which recorded the first plaintiff's own transactions. But, on full consideration, their Lordships are, in this matter, constrained to adhere to the view of the agreement taken by the Courts below. It was common ground between the parties there that the recorded statements of the 16th March and the 30th March 1922, were to be read together. So read these statements relate to all, and not to some only of the plaintiff's final lists which as has been said covered the whole range of the suit. There is no room for any discrimination in either statement, each of which the Board must assume to be correctly recorded. Their Lordships accordingly must conclude that if the agreement of the 30th March

1922, is effective for any purpose at all it is effective to the fullest extent of the six lists, so that the result in figures arrived at on that footing must inevitably follow.

But it is, however, contended by the appellants that, however the agreement be construed, they, for two separate and distinct reasons, are no longer bound by it. The first reason is that it has not been observed by the first defendant. The second is that the statements made by the first defendant and recorded as above set forth are not, as a result of defects in procedure, made binding upon the appellants by the Indian Oaths Act, 1873.

As to the first contention, it is said that in two respects the agreement was not observed by the first defendant in the proceedings before the Commissioner of partition. First of all, it is asserted, the Deity was not present on that occasion. His Dibba was in the kothri, but the Deity was not himself within it. To this assertion their Lordships can give no countenance. It was indeed only faintly made before them, although apparently strongly urged in the Court of the Judicial Commissioner. It cannot survive examination. The Deity in question was the family Deity of the plaintiff; the proceedings took place in the first plaintiff's presence in a kothri of the Deities in his house; the Dibba of the Deity was there by the first plaintiff's own direction; he knew exactly that the first defendant had to do, because he himself had dictated the procedure; he made no objection at the time to any irregularity or omission; he and the first defendant acted as if they both believed, as their Lordships cannot doubt they did, that the Deity was present in the Dibba. If, to the knowledge of the first plaintiff, the Deity was not so present, the whole proceeding was reduced to a farce, if not to something worse. There is, however, no affidavit or sworn statement by the first plaintiff or anyone else that the Deity was not actually present. The point was not, it seems, taken at all before the Subordinate Judge. It appears for the first time on the 3rd October 1922, in the plaintiff's grounds of appeal to the Court of the Judicial Commissioner. Like that Court, their Lordships are unable to countenance the suggestion, which was, they think, to say the least

of it, ill-advised on the part of the plaintiff.

But there is, it is, alleged, another respect in which the agreement was not observed. It was thereby contemplated, so it is said, that the Deity would be actually invoked by the first defendant when he attended to make in the presence of the God his admissions and denials. And no such invocation was made. The agreement, therefore, say the appellants, has not been performed in an essential particular. Now it is the fact that on the occasion in question there was no invocation of the Deity. It is not, however, true to say that the agreement made between the parties called for any such invocation. Their Lordships feel no doubt that the actual proceedings before the Commissioner amounted to a literal compliance with the terms of that agreement, And a substantial compliance also. For their Lordships are of opinion that the learned Subordinate Judge correctly interprets the views on this subject both of the plaintiff and defendant when he says that "the very presence

Of the god or idol on the spot when the statement was made, so to speak, within his sight and hearing was tantamount to his invocation by name in case of his absence. When the god or idol had been brought purposely on the scene to witness the statement of Defendant 1, it was by no means necessary to call upon him to bear witness, for having brought to the scene he could not be suspected to be inattentive or asleep.

The first objection therefore fails in both respects.

The second objection may be expanded thus: apart from such an invocation as has just been referred to and which was never made, and in the absence of anything done on the occasion that could properly be described as the administration to the first defendant of an oath or affirmation in the ordinary sense of those words, his admissions and denials are not within the Indian Oaths Act 1873, binding on the plaintiffs. As an aid to the consideration of this objection, which is much more formidable than any of the others, it will be convenient to set out, for facility of reference, the sections of the Indian Oaths Act, 1873, on which its determination must mainly turn.

The sections are the following:

5. Oaths or affirmations shall be made by the following persons:

(a) All witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or persons having by law or consent of parties authority to examine such persons or to receive evidence ;

(b) interpreters of questions put to, and evidence given by, witnesses ; and

(c) jurors.

Nothing herein contained shall render it lawful to administer, in a criminal proceeding, an oath or affirmation to the accused person, or necessary to administer to the official interpreter of any Court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.

6 Where the witness, interpreter or juror is a Hindu or Muhammadan or has an objection to making an oath,

he shall, instead of making an oath, make an affirmation.

In every other case the witness, interpreter or juror shall make an oath.

IV. FORMS OF OATHS AND AFFIRMATIONS.

7. All oaths and affirmations made under section five shall be administered according to such forms as the High Court may from time to time prescribe.

And until any such forms are prescribed by the High Court, such oaths and affirmations according to the forms now in use.

8. If any party to, or witness in, any judicial proceeding offers to give evidence on oath or solemn affirmation in any form common amongst, or held binding by persons of the race or persuasion to which he belongs, and not purporting to affect any third person, the Court may, if it thinks fit, notwithstanding anything hereinbefore contained, tender such oath or affirmation to him.

9. If any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation as is mentioned in section eight, if oath or such affirmation is made by the other to, or by any witness in, such proceeding, the Court may, if it thinks fit, ask such party or witness, or cause him to be asked, whether or not he will make the oath or affirmation :

Provided that no party or witness shall be compelled to attend personally in Court solely for the purpose of answering such question.

10. If such party or witness agrees to make such oath or affirmation, the Court may proceed to administer it, or if it is of such a nature that it may be more conveniently made out of Court, the Court may issue a commission to any person to administer it, and authorize him to take the evidence of the person to be sworn or affirmed and return it to the Court.

11. The evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated.

The judgment of the learned Subordinate Judge makes a careful record of the Indian authorities on this subject. The result of them, their Lordships are inclined to think, is that the point now raised has not so far been the subject of express decision. Safe, however, it is to

say, that in the decisions which have been brought to their Lordships' notice where a so-called "special oath" has been upheld there is no clear indication one way or the other, whether the person who took that oath recited any formula by way of invocation, or did anything else which in the ordinary sense of the words amounted to the making of an oath or affirmation. The question, accordingly, now that it has been raised must be determined on principle, and to this task their Lordships proceed.

It is not denied that the statements made by the first defendant here in the presence of the Deity were specially binding on his conscience by reason of the fact that they were so made. It is also recognized that the Subordinate Judge before he appointed a Commissioner was himself satisfied that the particular ritual to be followed fulfilled the conditions of S. 8 of the Act. Equally clear is it that the learned Judge intended to act in pursuance of S. 10, when on the 30th March 1922, he made this order of appointment :

With the consent of parties I appoint Bahu Mahesh Prasad pleader for going with the plaintiff's list before Lachmi Narsinghi in plaintiff's house and take defendant's admissions and denials of the list items before the deity.

The question, therefore, is whether the evidence of the first defendant, given in the presence of the Commissioner before the Deity, was, in these circumstances, evidence on oath or solemn affirmation administered by the Commissioner within the meaning of Ss. 8, 9 and 10 of the Act, and their Lordships, in agreement both with the learned Subordinate Judge and the Judicial Commissioners, are of opinion that this question must be answered in the affirmative. In their judgment, upon a sound construction of the sections, neither an invocation nor an oath or affirmation in the technical sense of these words is in any way an essential part of the so-called oath or solemn affirmation referred to in S. 8 of the Act.

Their Lordships are led to this conclusion by reference to the sections alone. They are confirmed in it, however, by recalling the stage of development which the law of India had reached on the subject of oaths by the date when the Act came into force.

Upon the point of construction the cardinal consideration to note is that the

"oath or solemn affirmation" referred to in S. 8 and following sections is something quite distinct from the oaths and affirmations referred to in S. 5. These are to be in such form as the High Court shall prescribe (S. 7). With regard to the oath or solemn affirmation referred to in S. 8, however, all that is said that it may be "in any form common amongst or held binding by persons of the race or persuasion to which [the deponent] belongs and not repugnant to justice or decency." That is to say, it may be as infinite alike in form and content, as racial custom or the dictates of any religious persuasion may, within the prescribed limits, sanction or require. But from its very nature and essence it can never be in any part of it dependent upon the direction or dictation of the High Court or of any other extra racial or secular administrative authority. It would or might at once lose its essential distinctive sanction if any such outside interference were permitted to have effect. And this brings their Lordships to the second matter which it is necessary to note in the construction of these sections. There is no suggestion either in S. 8, 9 or 10 that when the separate "oath or solemn affirmation" is permitted the ordinary oath or affirmation, as prescribed, or any part of it, is to be administered as well. The "oath or solemn affirmation" when permitted is a complete substitute for the other. There is in the sections no warrant for the suggestion that any part of a procedure which, be it remembered, is only appropriate where it is gone through before any evidence at all is given, and is designed to cover that evidence when given is to be transferred to a taking of evidence which, as in the present case, is solemnized only by its being given, and while it is given in the actual presence and hearing of the Deity himself.

Indeed, this case shows that such a requirement, not, their Lordships think, made by the sections, would in many cases be entirely out of place. When, as here, the whole meaning of the procedure is that a statement made by a witness in the corporeal presence and hearing of his God will be true by reason of the fact that it is so made, introductory words of invocation, appropriate enough in other circumstances, become entirely unsuitable. For if the Deity be

removed before the statement is made the words are nugatory; if the statement be made in his presence they are superfluous.

It is said further, however, that this construction of the sections attaches no adequate signification to the words "oath or solemn affirmation" in S. 8. Their Lordships, on consideration, do not agree. It appears to them that the use of the alternative expression "oath" and "solemn affirmation" as a description of the special ritual envisaged in S. 8, is intended to indicate that the ritual is to be at least as solemn for the deponent and attended by the same consequences to him as is an ordinary oath or affirmation for and to an ordinary witness. The words, their Lordships opine, were selected primarily to put it beyond the possibility of doubt that the temporal consequences of corrupt falsehood would follow as inevitably for the one class of witness as for the other: they are descriptive of the nature and result of the ritual: they are in no way concerned with its form—a conclusion which is confirmed by the consideration that historically an affirmation, technically so-called, is merely a substitute for an oath: that the description includes both "oath" and "affirmation," although, except in the quality of solemnity these are quite distinct, the one from the other, and that its purpose is revealed by the addition to the word affirmation of the adjective "solemn," which is not in use in connexion with affirmations in the technical sense of the word.

But, lastly, it is said that the oath or solemn affirmation must, as appears from S. 10, be something which either the Court or a Commissioner appointed by the Court can "administer" to the witness; it must, under S. 8, be something that can be "tendered" to him. Upon this it is to be remembered that "administer" is, in the law, a word of wide and not of restricted import. It would be for instance beyond question that an oath is "administered," not only where the English form is adopted, but where, in the presence of the Court, it is "taken" by the witness in the Scottish form. Their Lordships do not doubt that the terms of the section were here in this respect fully complied with when the admissions and denials of the first defendant were made, not only before

the Deity, but in the presence of the Commissioner. The word "tendered", in S. 8, does not appear to their Lordships to create any difficulty.

On construction alone, therefore, their Lordships reach the same conclusion as the Courts below. That conclusion is, however, in their judgment, confirmed by a reference to the course of development of the Indian law on this subject. That law was derived from the English law, with some modifications suggested by Indian conditions. Just as in England, so also in India, it was at one time the rule that there could be no evidence without an oath in the strict sense of the word, and only gradually were exceptions grafted by statute upon that rule. Prior to 1840 the privilege of making an affirmation instead of taking an oath was enjoyed only by Quakers, Moravians and Separatists. By that time it had been found that the taking of an oath was highly objectionable to Hindus and Mahomedans, and Act 5 of 1840 was passed for the purpose of prohibiting the administration of oaths to persons belonging to those communities, a form of affirmation being substituted for an oath. With some extension in 1869 the law so remained until the Act 6 of 1872 was passed. By that Act it was provided that every witness who objected to take an oath might instead make a simple affirmation, and in S. 4 will be found the statutory provision which, prior to 1873, enabled volunteers to make oaths in special cases. Sections 8 to 13 of the present Act of 1873 correspond to and have taken the place of that section, and their Lordships can have no doubt that long before that time the Indian view, embodied afresh in the Act, had come to be that which may, briefly, be taken from the words of the Lord Chancellor in *Omychund v. Barker* (1), and quoted by the Judicial Commissioners :

The next thing is the oath. It is laid down by all writers that the outward act is not essential to the oath. It has been the wisdom of all nations to administer such oaths as are agreeable to the notion of the person taking.

For all these reasons their Lordships dealing on this branch of the appeal with the one aspect of the matter brought before them by the appellant for consideration are constrained to agree with both Courts in India that the statements made by the first defendant in the

presence of the family Deity and before the Commissioners were conclusive upon the plaintiff.

An objection was taken by the appellants to certain items in the accounts which their Lordships at the hearing intimated that they could not entertain for reasons which they then gave. They do not repeat these reasons. In their Lordships' judgment the order of the Judicial Commissioner objected to was in all respects right, and they think that this appeal should be dismissed with costs.

And their Lordships will humbly advise His Majesty accordingly.

D.D. *Appeal dismissed.*

Solicitors for Appellants — *Barrow, Rogers and Nevill.*

Solicitors for Respondents—*T. C. Wilson & Co.*

A. I. R. 1927 Privy Council 172

(From Calcutta)

3rd March 1927

VISCOUNT DUNEDIN, LORD DARLING AND
SIR JOHN WALLIS.

Secretary of State for India—Appellant.

v.

Tarak Chandra Sadhukhan—Respondent.

Privy Council Appeals Nos. 35 and 36 of 1926; Calcutta Appeals Nos. 26 and 27 of 1925.

Land Acquisition Act (1894), S. 3 (a)—"Permanently fastened"—*Meaning.*

The epithet "permanently" is used as an antithesis to "temporarily." [P 172 C 2]

A. M. Dunne and *M. K. Brown*—for Appellant.

L. DeGruyther and *J. M. Parikh*—for Respondent.

Viscount Dunedin.—This is really a most hopeless case for appeal. Their Lordships do not think it necessary to add anything to what was so very well said by the President of the Improvement Tribunal, who has examined the facts with great accuracy.

As far as the construction of the Act is concerned (and the construction of the Act is the only thing to be determined), their Lordships will only say that it seems to them that the epithet "permanently" is used as an antithesis

(1) 1 Atk. 21 (22)=2 Eq. Abr. 897.

to "temporarily," and that upon the facts as put by the learned President there can be no doubt that these attachments were anything, but temporary and fall absolutely within the word "permanently." Indeed, their Lordships can only add that they wonder that such a case was appealed on behalf of the Government.

Their Lordships will, therefore, humbly advise His Majesty that these appeals be dismissed with costs.

G.B. *Appeals dismissed.*

Solicitor for Appellant — *Solicitor, India Office.*

Solicitors for Respondent—*Downer and Johnson.*

* * A. I. R. 1927 Privy Council 173

(From Nigeria)

24th May 1927.

VISCOUNT HALDANE AND LORDS SHAW
AND WARINGTON.

A. H. Bull & Co.—Appellants.

v.

West African Shipping Agency & Lighterage Co.—Respondents.

Privy Council Appeal No. 95 of 1926.

Master and servant—Servant lent to another for particular employment—Person to whom servant is lent is responsible for loss caused by the servant during that employment.

When one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him.

[P. 175, C. 2]

Plaintiff let out a lighter to the defendant. Part of the agreement was that the lighter should be manned by two lighter-boys, that is coloured labourers. The coloured labourers were, from the moment of the transfer out of control of the plaintiff. While the lighter was lying in the harbour for the night both of the labourers decamped; and they had forsaken the duties which they were bound to perform. The consequence was that the barge having parted her moorings drifted with the current out of the harbour and subsequently ran ashore and broke.

Held: that the plaintiff had entrusted for the period of the hiring the control of their chattel to the defendants. During the entire period of hiring the barge had to be watched over by the bailee and it was the bailee's duties to keep an eye upon the labourers or to furnish others so that the chattel might not be lost and therefore the defendants were liable for the loss.

[P. 173, C. 2, P. 174, C. 2]

Langton and Pritt—for Appellants.

Alexander Neilson and G. St. C. Pilcher—for Respondents.

Lord Shaw.—This is an appeal from a judgment of the Full Court of the Supreme Court of Nigeria reversing, on the 8th March 1926, and by a majority, the judgment of the Divisional Court, dated the 21st December 1925. The Divisional Court had given judgment in favour of the appellants for £2,376 5s. 2d. with interest and costs.

The substance of the claim was for the value of a lighter which became a total loss in circumstances about to be mentioned. The facts are very simple. Both parties are ship-owners, and according to the requirements of their trade the one is in the habit of letting lighters to the other. In June, 1925, the appellants let on hire to the respondents a lighter. There was no written agreement of hiring. Part of the agreement was that the lighter should be, as is usual, manned by two lighter-boys that is coloured labourers. The lighter was transferred on the 2nd June, and the mischance sued for occurred upon the night of the 5th June. The coloured labourers were, from the moment of the transfer, out of the control of the appellants, and subject to the orders and under the control of the defendants.

The use to which the defendants put the lighter was for the purpose of loading groundnuts on to their steamship "Rijnland." She was lying in the harbour of Lagos, and on the evening of the 5th June a strong ebb tide was running. Among the duties to be performed by the labourers was, of course, the obedience to all orders regarding the attachment of the lighter to the "Rijnland"; and it was a necessity of the case that they, or one of them, should be on board to do for themselves, or to obey orders to do what was required should the ropes be unable to stand the strain of the current. The simplest of all things would have been to catch a rope if thrown from the "Rijnland," and the boatswain of the "Rijnland" explains that if one of the boys had been there he would have thrown a rope.

Unfortunately both of the labourers had decamped; and they had forsaken the duties which they were bound to perform both of taking charge of the barge, and of giving obedience to the orders of the officers of the "Rijnland." The conse-

quence was that the barge, having parted her moorings, drifted with the current out of the harbour of Lagos, and subsequently ran ashore at a point about six miles distant therefrom and broke up before she could be salvaged.

These are substantially the relevant facts as found in the judgment pronounced by the learned Judge, Mr. Justice Tew. Their Lordships think it right to say in a word, with regard to that judgment, that in their opinion the learned Judge not only came to a right conclusion upon the facts, but that his review of this part of the law, and the decided cases thereon, meets with the Board's entire approval.

The Full Court (Maxwell J. dissenting) reversed this judgment: in particular upon the ground that there was no evidence that the lighter boys were at any time necessary except when the craft was under weigh or in active use. One of the plaintiffs' witnesses had said:

I do not think it advisable as a precaution for one lighter boy to remain on board all night. I don't think it could do any good.

Upon this the learned Chief Justice observes:

I can find nowhere in the other evidence before the Court an expression of an opinion to the contrary of that held and expressed by the plaintiffs' representative.

Their Lordships have some difficulty in understanding this opinion which seems to be quite out of accord, not only with the defendants' evidence but with the admissions made in the Court below.

Fontoin, the defendants' agents, swore:

When a lighter is alongside a ship at night my boys have orders to remain on board the lighter all night.

Brunt, the Master of the "Rijnland" says:

There was nobody on board that lighter. If there had been anybody to throw a line to, lighter would have been saved.

and on the special point in issue Van Duyn, the boatswain of the "Rijnland" says plainly:

In my opinion all lighter boys ought stay on lighter.

It is somewhat difficult to understand how such evidence should have been disregarded or rather stated to have been non-existent. Their Lordships do not refer further to the matter except to say that they think the proved facts are correctly viewed by Tew, J., and not by the Full Court.

The Full Court, however, went further and held on the question,

Would the owner of a lighter taking reasonable precautions for the safety of the lighter . . .

. . . keep a boy on board the lighter at night?

in the negative. In the opinion of their Lordships this was wrong. The appellants had entrusted for the period of the hiring the control of their chattel to the respondents. The lighter was manned by two coloured labourers, and from the very nature of the case the lighter and the men both went out of the control of the plaintiffs, and it is unreasonable to suggest that this control only lasted while the active work of lightering was being carried on; and the suggestion that the lighter boys passed into the control of the defendants during that active lightering, but out of the control and back into the service of the plaintiffs when the ship was tied up for the night, seems to have nothing to commend it. The sense, as well as the law, of the position is that during the entire period of hiring the barge had to be watched over by the bailee, and it was the bailee's duties to keep an eye upon the labourers, or to furnish others so that the chattel might not be lost.

Upon the law of the case, it may be said, the facts being as just put, that the cleavage of opinion in *Laugher v. Pointer* (1) in which the Judges were equally divided, has been long disposed of in *Quarman v. Burnett* (2). Baron Parke thus dealt with it:

We are therefore compelled to decide upon the question left unsettled by the case of *Laugher v. Pointer* (1). We have considered them fully, and we think the weight of authority, and legal principle is in favour of the view taken by Lord Tenterden and Mr. Justice Littledale.

Quarman's case (2) was stronger on the facts than that of *Laugher*. In *Laugher's* case (1) the facts had been that the owner of a carriage hired a pair of horses to draw it for a day, and the owner of the horses provided a driver through whose negligent driving an injury was done to a horse belonging to a third person. In *Quarman's* case (2) the owners of the carriage were in the habit of hiring horses from the same person, to drive them for a day, or for a drive. The owner provided a driver through whose negligence an injury was done to a third

(1) 5 B. and C. 517 = 4 L. J. (O. S.) K. B. 309 = 8 D. and R. 550.

(2) 6 M. and W. 499 = 9 L. J. Ex. 303 = 4 Jur. 969.

party, and it was held that the owners of the carriage were not liable to be sued for such injury. It appeared that the hiring was quite a customary thing so much so that the owner of the carriage even provided the driver with a livery which he left at his house at the end of each drive.

Their Lordships think it only necessary to refer to *Donovan v. Laing* (3) for a clear exposition of the question to whom attaches responsibility for the act of a servant transferred, so to speak, for the convenience of working a chattel lent or hired to another. In a sense, that is to say a general sense, he is the servant of the master who sends him, but upon the practical point of responsibility, when he is doing the work of and under the orders or control of the other employer to whom he is sent, he is, in the eye of the law, the servant of the latter and the latter is, in the eye of the law, his employer.

In *Donovan's* case (3), the defendants contracted to lend to a firm, who were engaged in loading a ship, a crane with a man in charge of it; the man received directions from the firm or their servants as to the working of the crane, and the defendants had no control in the matter. It was held that though the man in charge of the crane remained the general servant of the defendants' yet, as he had parted with the power of controlling him with regard to the matter on which he was engaged, they were not liable for his negligence while so employed.

Lord Justice Bowen put the matter thus:

The law on the matter now before us seems to me to be perfectly clear. . . . We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act. . . . It is clear here that the defendants placed their man at the disposal of Jones & Co., and did not have any control over the work he was to do.

The same law had practically been laid down in *Bourke v. The White Moss Colliery* (4). In the opinion of their Lordships the law stands exactly where Cockburn, C. J., there put it, namely, as follows:

(3) (1893) 1 Q. B. 629=4 R. 317=63 L. J. Q. B. 25=68 L. T. 512=57 J. P. 583=41 W. R. 455.

(4) 2 C. P. D. 205=36 L. T. 49=46 L. J. C. P. 283=25 W. R. 263.

When one person lends his servant to another for a particular employment the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him.

These cases have a habit of repeating themselves, and there are others in the books to the same effect, but their Lordships think it only necessary to refer to *Bain v. The Central Vermont Ry. Co.* (5) in which Lord Dunedin approves of the language of Mr. Justice Cross in the Court of King's Bench of Quebec, who had adopted the suitable phraseology of "patron momentane" and "patron habituel." The responsibility in respect of which negligence on the part of a servant in circumstances such as of that and of the present case attaches to the former and not to the latter.

Two further points may be mentioned in a word. It is argued that the men being away from the barge was not negligence. They had deserted their duty at a moment as it turned out, which was critical for the safety of the ship. While doing so, and at that moment, they were in the service of the defendants. The defendants had not provided any other servants to supply their place, in what was a continuous duty. It seems out of the question to suggest that these circumstances did not constitute negligence for which the respondents were responsible.

Their Lordships will humbly advise His Majesty that this appeal ought to be allowed; the judgment of the Full Court set aside with costs; and the judgment of the Divisional Court restored.

The respondents will pay the costs of the appeal.

G.B.

Appeal allowed.

Solicitors for Appellants—*Lawrence, Jones & Co.*

Solicitors for Respondents—*Botterell & Roche.*

(5) A. I. R. 1921 P. C. 222=(1921) 2 A. C. 412 (P. C.).

* * A. I. R. 1927 Privy Council 176

(From Bombay: A. I. R. 1924 Bombay 1.)

27th May 1927.

VISCOUNT SUMNER, LORDS ATKINSON,
CARSON AND DARLING, AND SIR
LANCELOT SANDERSON.

*Bhagchand Dagdusa Gujrathi and
others—Appellants.*

v.

Secretary of State for India—Respondent.

Privy Council Appeal No. 68 of 1925.

* * (a) *Civil P. C., S. 80—Two months' time must be allowed in all kinds of suits: 35 Bom. 362=10 I.C. 639; 37 Bom. 243=17 I.C. 876 and 40 Bom. 392=34 I. C. 535, Overruled.*

The view that plaintiff can bring his suit before the two months' time prescribed has expired in the case of suits against officials for acts purporting to be done in discharge of their duties, when part or the whole of the relief claimed is an injunction, is not correct; 25 Cal. 239; A. I. R. 1924 Cal. 145; 37 Mad. 113; 41 Mad. 792 and A. I. R. 1924 All. 851, Appr. 35 Bom. 362=10 I. C. 639; 37 Bom. 243=17 I. C. 876 and 40 Bom. 392=34 I. C. 535 Overruled. [P 183, C 1]

Section 80 is to be strictly complied with and is applicable to all forms of action and all kinds of relief. [P 183, C 1]

(b) *Bombay District Police Act, S. 26 (1), Proviso—"In default of recovery" do not mean wilful default by Municipality—If old levy is superseded by new one, S. 26 (1) must be again complied with.*

The words "in default of recovery" by the Municipality in proviso to S. 26 (1) do not mean "in case of wilful default." The provision that, when Government decrees integrally a levy for the recovery of the cost of additional police, its execution must be put into and left in the hands of the Municipality, when there is one, until default is made, is more than a form, and cannot be waived, nor is it a matter in which irregularity can be excused. It has a constitutional importance, which must be recognized. Where therefore an old levy is superseded by a new one to be recovered from different people and to be recovered in a different manner, there is a new exercise of the power by Government under S. 25 (2) and the mandatory provisions of S. 26 (1) would apply to such new levy. [P 181, C 2, P 182, C 1]

(c) *Bombay District Police Act, S. 25-A (1) (a) and (1) (b)—Action under S. 25-A (1) (b) is not judicial—District Magistrate may act with consultation with superior officers—Taxing is not restricted to one occasion only.*

The Magistrate's action under 25-A (1) (b) is not a judicial proceeding, and there is nothing in the Act which requires that his action in this matter should be taken wholly on his own initiative or without instructions or recommendations from his superiors. Nothing prevents the Commissioner's sanction from being given from time to time or after consulta-

tion, nor is there anything about it which confines it to starting the Magistrate on a course of action, which he is thereafter to pursue independently and alone. [P 178, C 2]

Furthermore, there is nothing in Ss. 25-A (1) (a) or 25-A (1) (b) to restrict the exercise of this taxing function to one occasion and one only. The powers which they give are not spent by a single exercise. The finality referred to in S. 25-A (4) relates exclusively to the Commissioner's function of review and the directions of the District Magistrate are not capable of being challenged otherwise than is thereby provided. [P 178, C 2]

(d) *Bombay District Police Act, Ss. 25, 25-A and 79—Errors in notification are immaterial if provisions are substantially followed.*

Where the provisions of the Act are substantially complied with, any errors in the notification will not invalidate the proceedings. [P 179, C 2]

(e) *Bombay District Police Act, Ss. 25 and 25-A—Actual complicity of persons to be taxed is immaterial.*

The Act does not require proof of the active complicity of a section of the inhabitants before recovery is ordered to be made from it. [P 183, C 1]

(f) *Bombay District Police Act, S. 25-A—Order directing enquiry whether persons to be charged were with Government during riots—Omission to enquire is not an illegality.*

Where the District Magistrate, in passing an order under S. 25-A added that to prevent injustice the Deputy Collector should hold an enquiry at which the people to be charged should be given an opportunity of furnishing proof that, before, during and after the riots, they were actively and publicly on the side of Government.

Held: that the District Magistrate's suggestions formed no part of the order made under S. 25-A: constituted a condition precedent to its validity. [P 180, C 2, P 181, C 1]

(g) *Government of India Act (1858), S. 65—Regulation of civil procedure is not subject to S. 65—Civil P. C., S. 1.*

The regulation of civil procedure has nothing to do with the obligations formerly vesting in the East India Company as a trading corporation, for it is incidental to the duties of the ruling power, and cannot be said to be subject to the Government of India Act, 1858, S. 65. [P 185, C 2]

L. DeGruyther and J. M. Parikh—for Appellants.

G. R. Lowndes and K. Brown—for Respondent.

Viscount Sumner.—In this action forty-eight plaintiffs joined in suing the Secretary of State for India and the Collector and District Magistrate of Nasik for two kinds of relief: (a) a declaration that certain official notices and orders were ultra vires and invalid, and (b) an injunction permanently restraining all executive action thereunder. Unless the right to the first relief was made out, the prayer for the second necessarily

failed. The suit was begun less than two months after notice of the intention to bring it had been given to the respondents. It was dismissed by the District Judge on all grounds, and by the High Court of Bombay as well, but, as to one of the learned Judges, not altogether on the same grounds. The plaintiffs now appeal.

In April 1921, serious disorder occurred at Malegaon, in the District of Nasik, Bombay, connected with the Khilafat agitation, and in the consequent unlawful assemblies and riots there was loss of life and much damage to property. The Muhammadan weavers, who formed the large majority of the male inhabitants of the place, were the chief culprits, though it is not likely that they acted without instigation from other parties. Some persons were punished criminally, but the question remained how the injured parties were to be compensated and how order was to be maintained in future. An inquiry was accordingly held, and amounts were fixed, by way of compensation to persons who had suffered in the riots. The Government decided to put in force the provisions of the Bombay District Police Act No. 4 of 1890, and orders were duly made for the employment of additional police at the expense of the inhabitants and for payment of compensation for the injuries sustained. Under these orders the income-tax payers, a small class, and the great body of the weavers were designated as the parties to pay the sums required. No question as to the correctness of these proceedings now arises.

Under the Act it was for the Collector to get in the amount of the compensation and for the Municipality of Malegaon to enforce payment of the police rate. Both were unable to do so. Coercion of the weavers generally, who had few belongings and lived in the main from hand to mouth, proved to be impracticable. As to the ratepayers, the Municipality lacked means of enforcing a general payment, and were openly set at defiance. By the spring of the following year the position had become exceedingly unsatisfactory. Some small sums had been collected from the income-tax payers, but, in spite of much patience on the part of the executive and a lapse of time sufficient to have allayed the original turbulence, the measures taken under

the Police Act had practically come to nothing.

Accordingly, in March 1922, the District Magistrate of Nasik, who was Collector as well, proposed to the Commissioner for the Central Division that, instead of seeking to recover the amounts due for compensation from the weavers directly, a tax should be imposed personally on the merchants at Malegaon, who sold to the weavers the yarn for the saris, which they made, and bought from them their finished product. The amount of the tax in each merchant's case was to be measured by the amount of his dealings with the weavers during a period indicated. These merchants constituted a small class, likely to be easy to deal with, and many of them were weavers themselves. In the ordinary course, whatever they paid they would pass on to their customers by charging more for their yarn and giving less for the saris. It was unlikely that the weavers as a body could resist this re-adjustment, having no capital of their own and no means of quitting Malegaon to carry on their industry elsewhere. The Magistrate was careful to point out that, if his suggestion was adopted, a modification would be required in the order of the 16th August 1921, under which payment of the compensation had been imposed in terms on the Muhammadan weavers. The Commissioner passed the proposal to the Home Department, expressing his approval, and forwarding a copy of this approval to the Collector of Nasik. In April 1922, the Government also approved the proposal and directed that the District Magistrate should be so informed, and, having thus dealt with the question of compensation, took up that of the expense of the extra police force. Here, too, it was decided to adopt the same plan, namely, to recover the sums outstanding from the shopkeepers, both Muhammadan and Hindu, who dealt in saris and yarn.

A notification, No. 152, dated the 6th June, 1922, was then published in the Bombay Government Gazette. This is the document which, with demand notices issued thereunder, the appellants by their prayer in this suit seek to have declared to be invalid and unlawful. It purports to be made by the Governor in Council and to direct, under S. 25, that

the cost of the additional police shall be defrayed wholly by a tax imposed on the Muhammadan income-tax payers, who are inhabitants of the said town, and by a rate assessed on the property of such other inhabitants as are

notified in manner set forth, and under S. 25A that the above cost and the total amount of compensation awarded by the District Magistrate of Nasik should be assessed and recovered, first from payers of income-tax in certain amounts and instalments; and secondly:

The balance of the combined charges, after the amount recoverable from persons of Class I has been deducted, shall be recovered on behalf of the Momin adult weavers of Malegaon from both Muhammadan and Hindu shopkeepers of Malegaon dealing in saris and yarn, who shall pay every year up to 31st May 1923, beginning from 1st July 1921, a rate calculated by the District Magistrate, Nasik, at a sum not exceeding six annas, multiplied by the average number of saris hitherto purchased by them from Momin weavers of Malegaon annually, or a sum not exceeding Rs. 5, multiplied by the average number of bales of yarn hitherto sold by them to Momin weavers of Malegaon annually, as the case may be.

And, whereas the Municipality of Malegaon has made a default in the recovery of the charges on account of the said additional police, the Governor in Council is pleased to direct, under the proviso to S. 26 (1) of the said Act that the recovery of the said charges shall be made by the Collector of the district along with the compensation money as an arrear of land revenue. . . .

The employment of additional police in consequence of the rioting, which caused the damage, and the compensation for the damage thus done, are respectively dealt with in S. 25 and S. 25A of the Act. It will be seen that the Act prescribes no forms and few formalities. The District Magistrate, with the Commissioner's previous sanction, fixes the proportions in which individuals are to make payments towards the compensation, which he has ascertained, for damage done, and decides whether all the inhabitants of the local area affected, or only particular sections or classes, and if so which, are to pay, and he then directs and requires the Collector to recover the amounts accordingly. How the Commissioner's previous sanction is to be given, and how the decision of the Magistrate and his direction and requisition to the Collector are to be formulated, the section does not say. So with the additional police, though their employment in the first instance has to be directed by notification, the mode in which the cost is to be defrayed is to be

simply directed by Government in accordance with sub-S. 2(A) and (B), and notification at this stage is not prescribed. Furthermore, in regard to each section, it is to be noticed that the determination of the incidence of the tax in question is an executive and not a judicial act. It is a function of the Government in the one case, and of the District Magistrate in the other, but in both cases its character is the same. Whatever may be said of the inquiry under S. 25A (1) A, into claims to be compensated for the damage sustained, the Magistrate's action under S. 25A (1) B is not a judicial proceeding, and there is nothing in the Act which requires that his action in this matter should be taken wholly on his own initiative or without instructions or recommendations from his superiors: cf. *Ezra v. The Secretary of State* (1). Even the Commissioner's sanction is only stated to be previous, it is not required to be given once for all. Nothing prevents it from being given from time to time or after consultation, nor is there anything about it which confines it to starting the Magistrate on a course of action, which he is thereafter to pursue independently and alone.

There is furthermore nothing in either section to restrict the exercise of this taxing function to one occasion and one only. The powers which they give are not spent by a single exercise. The finality referred to in S. 25A (4) relates exclusively to the Commissioner's function of review. The directions of the District Magistrate are not capable of being challenged otherwise than is thereby provided, but it is quite a different thing to say that the giving of one direction exhausts all the Magistrate's powers and leaves him thereafter incapable of any substituted or amending action. Such a provision would be appropriate only to the judgment of a Court and not to administrative action such as this. Such a construction would tend to deprive the enactment of its practical utility.

On the Government Notification, No. 152, the appellants' contentions may be summarised thus: The Notification includes in one document without distinction two separate matters—compen-

(1) [1903] 30 Cal. 36 at pp. 83 to 85 = 7 C. W. N. 249.

sation for damage and the cost of additional police. In respect of the former it passes over the District Magistrate altogether, ousts his jurisdiction, and determines the incidence of the compensation tax by direct Government decree. Without discharging the orders previously made, it requires the collection of tax from Hindus and from shopkeepers, which, under those prior orders, had been imposed only on Muhammadans and weavers, a thing without legal warrant. Either the Government is making a new order, which is bad because it trespasses on the exclusive functions of the District Magistrate, or it is applying to his old order a new method of exacting the tax from persons who are in terms outside the ambit of the old order as it stands. In the alternative, it constituted the shopkeepers agents for the weavers, contrary alike to fact and to law, and, under the strongest personal penalties in case of failure it called on them to pay on behalf of principals, who had neither authorized payment nor put them in funds to make it. The obvious explanation of the real intent of the Notification, which is furnished by the previous reports and communications, is brushed aside by the appellants on the singular plea that this written instrument, unlike others, is to be looked at in isolation from the circumstances, in which it was promulgated, and as a matter of construction is so drawn as to contain on its face two plain transgressions of the very Act, in pursuance of which it is expressed to be published.

It is, of course, easy to be wise after the event. It may be admitted that the notification would have been improved: (a) by a statement that the new mode of raising the money was directed in lieu of the old one, the orders for which were pro tanto discharged; and (b) by the complete omission of any reference to the mode in which the shopkeepers might recoup themselves by adjustments of the prices of yarn and saris respectively. Probably the draughtsman could find ample excuse in the circumstances of a harassing period of office. At any rate, although the same notification includes both the cost of the police and the payment of compensation, the two matters are clearly severable, and the exercise of the powers of the Government under S. 25 is not prejudiced by the additional

notification of the course, which the District Magistrate was about to take under S. 25A.

The short answer, however, to all this is to be found in construing the document reasonably in the light of the existing circumstances, and by referring for the rest to S. 79 of the Act:

No . . . order, direction . . . or notification, made or published and no act done under any provision herein contained or in substantial conformity to the same shall be deemed illegal, void, invalid or insufficient for any defect of form or publication or any irregularity of procedure.

In the circumstances the meaning of the notification is obvious. As regards the cost of the additional police, the Government direction is actually expressed to be in supersession of those previous notifications dealing with the incidence of the payments, and the substituted incidence, which is in other words a new tax, is described alike for the compensation payments. Being, in fact, a substitution for the previous tax and sufficiently so described in the case of the police charges, it is, in their Lordship's opinion, a mere defect of form not to have reiterated the words showing expressly, as to the compensation charge also, that the taxing part of the notification is new. The same consideration applies to the fact that the Notification speaks of the total amount of the compensation having been awarded by the District Magistrate under S. 25A and then goes on to speak of the mode of recovery as having been directed by the Governor-in-Council. Nothing in S. 25A prescribes this part of the Notification at all, and to this extent it may be needless to refer to S. 79. The fact was that the Commissioner's previous sanction having been given (none the less regularly that he expressed it in two lines endorsed on the District Magistrate's letter to himself, of which he caused a copy to be sent to that official), the District Magistrate proceeded on the 12th June 1922, to send to himself as Collector a requirement to recover payments from persons named, with particulars for calculating the amounts, which had been originally suggested by himself in principle and had now been determined by himself in detail. After this substantial conformity with the provisions of S. 25A, their Lordships think that the errors in the Notification, if errors there were, do not matter.

The appellants, however, have contended that the whole proceeding was invalid because it involved the fundamental injustice of requiring a class of persons, not shown by any evidence to have been implicated in the riots, to bear a penalty, which ought rightly to have fallen only on those who were, and because agents were taxed instead of principals, for which the Police Act affords no warrant. The expression used in the Notification—"on behalf of the Momin adult weavers of Malegaon"—is made to play a large part in this contention.

It may be readily admitted that the words were not felicitous. They lend themselves to misunderstanding. On 21st April 1922, the Sub-divisional Magistrate of Nasik had issued a notice to the people of Malegaon in which he stated that

the shopkeepers who sell yarn to the Momins . . . are to be considered as agents for the purposes of recovery of these amounts.

In itself this action was insignificant and it may not have been known to the Government when the Notification was issued, but the use of words which seemed to support this notice instead of words clearly negating it, was unfortunate. What was meant, however, was that the shopkeepers were to be substituted for the weavers, as the section of the inhabitants to be charged with payment of the levy under the Act, with an addition, well-meant but probably unnecessary, that they might and would find means of passing on the burden to the weavers. In any case, these words were outside the requirements of the Police Act. They do not contravene it, though they do not correctly describe what was being done.

As for the rest of this branch of the complaint, the Act does not require proof of the active complicity of a section of the inhabitants before such an order as the Act contemplates can be made. To imply such a requirement would defeat the objects of the Act. It is the essence of measures of this kind, which in one form or another are not uncommon, that one class has to pay for the misdeeds of another, but this in itself constitutes no objection to the course that was taken. There is no issue before their Lordships with regard to the propriety of applying these provisions of the Police Act under

the circumstances which had arisen, and they express no opinion about it, but they are not to be taken as suggesting that any question could be raised as to the action of the Government and District Magistrate in itself. Those who are called on to apply such an Act as this have not only the power but the duty of enforcing it when, in their judgment, a case has arisen which calls for its application. They are the best and the only judges in that matter.

Some minor objections were taken, which are either complete misapprehensions or are sufficiently met by S. 79. It will suffice to mention two. In writing to the Commissioner, on 7th March 1922, the District Magistrate had said :

To prevent any injustice being done to the Hindus I would propose that the Deputy Collector in charge of Malegaon Sub division should hold a summary inquiry at which the Hindu shopkeepers . . . should be called upon to be present and that, they should be given an opportunity of furnishing proof that before, during and after the riots they were actively and publicly on the side of Government. . . . When after this inquiry is finished these lists of merchants are fixed the Deputy Collector should estimate approximately the number of saris and the bales of yarn that actually pass through each man's hands The Deputy Collector would make this assesment very much in the way in which income-tax assessments are made. The assesment would be rough and ready but it would be on very liberal lines.

Subsequently, on 21st April 1922, the District Magistrate instructed the Sub-divisional Magistrate to take this summary inquiry in hand adding directions which show that what was further required was an administrative measure to furnish information, on which he himself would proceed to make definitive orders, simultaneous with the expected Government Notification. Founding on this, the appellants say that the Hindu shopkeepers ought to have had the opportunity of criticising and refuting the information obtained by the Deputy Collector and that, failing such opportunity, the assesment, which was made on the footing of his report, cannot be enforced against them. This argument overlooks the fact that the first proposed inquiry was to enable the shopkeepers to show that they had at some time been on the side of the Government and of law and order, which at no time have any of them attempted to show ; that the inquiries actually made, as to the trade which the different merchants did, appear to have

been such as would have been admissible for income-tax purposes; that in any case the District Magistrate's suggestions formed no part of the order made under S. 25A or constituted a condition precedent to its validity; and that the Act is silent as to any such inquiry though, when an inquiry is desired, it is named expressly and that the implication of such an inquiry-dilatory and often inconclusive as it would be-would tend to defeat the operation of the Act itself. No substantial injustice appears to have been done for, although the notices issued to individual merchants, dated 25th April 1922, invited them to show cause against the proposed assessments of the amount of the tax falling severally on them, they do not appear to have adopted this remedy, but preferred to try the effect of this collective suit for an injunction as a total discomfiture of the Government.

The other contention is this: When the District Magistrate issued his requirement to the Collector on 12th June 1922, he named dates for payment of the instalments prescribed which appear to make the first year for the recoveries begin on 1st January 1922. In the notice served by the Collector on shopkeepers individually under the same date the first year of liability is stated as beginning on 1st July 1921. It is said that this constitutes in form a retrospective imposition of tax; not warranted by the Act, which, in fact, bars the exercise of the contemplated relief by way of passing on the charge to customers, since, in 1922/1923, a shopkeeper could not make deductions or additions from or to his purchases or sales which had been made in 1921. The answer is that the discrepancy as to the date of commencement of the first year is a mere irregularity, and that there is nothing retrospective about the matter. The payment imposed is imposed *de futuro* and the dates are mere elements in a calculation of the amounts and dates of the instalments. As to passing on the burden to the weavers at all, that was purely optional and formed no part of the order.

In one matter, however, not relatively important in itself, their Lordships think that the prescriptions of the Police Act were not observed. In regard to the cost of additional police, the Act provides as follows:

25. (4) If the local area in which any such tax is to be imposed or any such rate is to be assessed is a Municipal district, the amount of the charge shall be paid by the Municipality from the municipal fund or the rate shall be assessed by the Municipality conformably to the direction given by Government.

26 (1). Every tax imposed or rate assessed under the last two preceding sections . . . by a Municipality shall be recovered by such Municipality from each person assessable therefor in the same manner as a municipal tax due by him: Provided always that in default of such recovery it shall be lawful for the Government to direct or to recover such tax or rate.

Now on the 1st December 1921, before the plan of direct collection from the weavers had been given up, the President of the Municipality of Malegaon had reported to the Collector of Nasik on the position as it then was. He recalled that, soon after the disturbances, when it was contemplated that the cost of the additional police should be recovered by the Municipality, he had represented to the Collector that it was totally unable to undertake the work in question. He stated that the weavers had become increasingly recalcitrant, that they flatly refused to pay and abused the officials employed. He quoted them as saying openly that the Municipality had no business to undertake the work, when the majority of ratepayers were thoroughly opposed to payment, and he added that even the income-tax payers (only 26 in number) paid nothing but passively awaited the issue of warrants of distress under S. 183 of the District Municipal Act. His report concluded thus:

Irregular recovery of Municipal taxes and large outstandings every year are due to the same reason. I may add that not a single pie of additional police charges has been recovered up to now. The situation, therefore, is very delicate, and it must be handled with great tact and circumspection. I, therefore, seek your advice as to how I should proceed in the matter. I should also be enlightened on the point, whether the work of executing warrants of distress against income-tax payers should be taken in hand.

The proviso to S. 26 (1) of the Police Act speaks of "in default of recovery" by the Municipality, not "in case of wilful default," and, if the Government read this report under the circumstances as a simple confession of failure so far there can be no question that the interpretation was justified. The Municipality had never desired to be charged with this recovery: they had sufficient experience of the difficulty of getting any money out of the weavers to desire no more of such responsibilities, and they

had come as near as they respectfully could to inviting the Government to collect its money for itself. Accordingly the recovery of the costs of the additional police was placed in the Collector's hands.

It appears, however, to have been overlooked that the object and effect of what was done in June 1922, was to supersede the old levy by a new one, to be made on different persons and to be measured in a different manner. It was a new exercise of the powers given to the Government by S. 25 (2) to which therefore, the mandatory provisions of sub-S. (4) at once attached. The report made by the President of the Municipality dealt only with the superseded method of recovery and could not be said to amount to a refusal to try to recover anything, old or new, or to an anticipatory declaration of default under all circumstances. The appellants, accordingly, urge that the Municipality ought to have had the opportunity of making their own assessments, pursuant to S. 25 (4), and of seeing what they could do with a body of shopkeepers men of substance and probably men of peace, who at any rate had a good deal to lose by defying the law, for the chances of success in dealing with them were greater than those attending on a conflict with a numerous body of turbulent workmen who had little or nothing to lose. They say that the conditions had not been fulfilled, which the Act fixes as precedent to the Collector's right to get in the police rate from them. The point is legally open to them now, little as it can be supposed that they actually desired at the time to have had any demands made by the Municipality on them.

The provision that, when Government decrees integrally a levy for the recovery of the cost of additional police, its execution must be put into and left in the hands of the Municipality, when there is one, until default is made, appears to their Lordships to be more than a form which might be waived, or a matter, in which irregularity is excused. It cannot be a mere irregularity to disregard an express statutory prescription, however honestly or excusably, nor is a short cut permissible because the proscribed course promises little advantage. The Police Act interposes between the punitive

action of the Government and the incidence of the burden on the individual the executive action of a Municipality which may be supposed to feel a responsibility towards its rate-payers and to mitigate, from their point of view the severity of the chastisement. It has, therefore, a constitutional importance, which must be recognised whether the practical moment of this arrangement is really considerable or not. On this point only and on this ground alone their Lordships are of opinion that the demand made by the Collector for payments in recovery of the costs of the additional police was premature and not in accordance with the Act.

It, accordingly, becomes necessary to consider the answer which S. 80 of the Code of Civil Procedure affords to the appellants' claim. This answer, if it is applicable at all, applies to the whole suit, but, in view of the numerous and precise attacks, which have been made throughout the proceedings on all the Government officials concerned, and of the differences of opinion which have been expressed in India upon them, it did not seem to their Lordships either right or wise not to examine them, with the object of seeing whether they had any foundation.

This section and its predecessor, S. 424 of the Code of 1882, have stood for over forty years, substantially in the same form, as a protection to officials in precise terms against personal responsibility for official action. How far-reaching such protection ought to be is a matter of policy; how far it actually extends is a question of a judicial construction.

That this suit is one to which S. 80 applies is common ground; the contest is as to its effect when applied. The plaintiff avers (para. 17) that "Notice, as required under S. 80 of the Civil P. C., has been given to the Collector." This was given on the 26th June 1922, and the act, purporting to have been done by him in his official capacity which was relied on, was the issue of notices for the recovery from the plaintiffs in the suit of the tax referred to in Notification 152. It does not appear that any notice was served on the Secretary of State, though the section requires it, but no independent ground of defence has been raised on this. The plaintiff proceeds in the same paragraph "as the suit is for an injuno-

tion, and as the defendants are about to recover the amount demanded in the notices soon, the suit is filed before the completion of the period of two months." No particulars were given to show that the Collector intended to enforce the orders before the 15th August 1922, nor was any satisfactory evidence given to this effect. The plaintiffs appear to have relied simply on the fact that part of the relief claimed in the suit was an injunction.

For many years there has been a marked difference of opinion between the High Court of Bombay, on the one hand, and all the other High Courts in India, on the other, as to the true application of S. 80 of the Civil P. C. (Act 5) of 1908 and of S. 424 of the Code (Act 10) of 1877, which it superseded in the case of suits against officials for acts purporting to be done in discharge of their duties, when part or the whole of the relief claimed is a perpetual injunction. After some differences of opinion among their subordinate Courts, the High Courts of Calcutta, Madras and Allahabad have now agreed in deciding that these sections are to be strictly complied with and are applicable to all forms of action and all kinds of relief: see the case of *Secy. of State v. Rajlucki Debi* (2) and *Dakshina Ranjan v. Omar Chand* (3) of *Secy. of State v. Kalekhan* (4) and *Koti Reddi v. P. Subbiah* (5); of *Bachchu Singh v. Secy. of State* (6), and *Abdul Rahim v. Abdul Rahim* (7). In Bombay on the other hand, in the cases of *Secy. of State v. Gajanan Krishnarao* (8), *Naginlal v. Official Assignee* (9) and *Secy. of State v. Gulam Rosul* (10), which were suits to restrain by injunction the commission of some official act prejudicial to the plaintiff, it has been intimated or held that, if the immediate result of the Act would be to inflict

irremediable harm, S. 80 does not compel the plaintiff to wait two months before bringing his suit, though, if nothing is to be apprehended beyond what payment of damages would compensate, the rule is otherwise and the section applies.

As the Code of Civil Procedure is applicable to all the High Courts in India, and as S. 80 is intended to afford a protection (whatever exactly it may be), to all officials, high and low, it is certainly undesirable that a difference of opinion such as this should be left unresolved. What appears to have influenced the learned Judges is, firstly, their assumption as to the practical objects with which it was framed (see *Shahabzadee Begum v. Fergusson* (11), *Peary Mohan Das v. Weston* (12) and *Raghubanso v. Phul Kumari* (13); and, secondly, is the fact that this protection takes the form of providing for a fixed and obligatory interval of two months between the required notice and the commencement of any suit in respect of the officials' action. It is only right to observe in this connexion that, under S. 80 (2) of the Bombay Police Act, at any rate, and it may be under other similar provisions, damages would not be recoverable from a public servant, who gave effect in good faith to orders issued with apparent authority. It appears, therefore, to have been due to anxiety not to expose a plaintiff to the risk of the execution of an invalid order without practical redress, that they adopted a construction, which is not in accord with that accepted generally. The point has been put in this way: S. 80 is but a part of a Procedure Code, passed to provide the regulations and machinery, by means of which the Courts may do justice between the parties. A construction which may lead to injustice is one which ought not to be adopted, since it would be repugnant to the whole tenor and purpose of the Act, and the implication of a suitable exception or qualification is, therefore, justifiable and even necessary. In effect, however, their decisions are not altogether reconcilable with one another, either as to the extent to which they go, or as to the reasoning on which

(2) [1897] 25 Cal. 239.

(3) A. I. R. 1924 Cal. 145=50 Cal. 992.

(4) [1912] 37 Mad. 113=28 M. L. J. 181=16 I. C. 947=(1912) M. W. N. 786.

(5) [1918] 41 Mad. 792=34 M. L. J. 494=7 M. L. W. 586=46 I. C. 86=(1918) M. W. N. 414 (F. B.).

(6) [1902] 25 All. 187.

(7) A. I. R. 1924 All. 851=46 All. 884.

(8) [1911] 35 Bom. 362=10 I. C. 639=13 Bom. L. R. 273.

(9) [1912] 37 Bom. 243=17 I. C. 876=14 Bom. L. R. 1148.

(10) [1916] 40 Bom. 392=34 I. C. 535=18 Bom. L. R. 243.

(11) [1881] 7 Cal. 499.

(12) [1912] 16 C. W. N. 145=13 I. C. 721=13 Cr. L. J. 65.

(13) [1905] 32 Cal. 1130=1 C. L. J. 542.

they are based. Whether the section should be read as if it ran

no suit other than a suit in which an injunction is claimed,

or as if it ran

no suit shall be instituted except when serious or irreparable damage might be occasioned to the plaintiff, if not prevented by the previous grant of an injunction,

does not appear to have been settled. In the one case all suits falling within the section could safely anticipate the prescribed delay by the simple device of adding a claim for an injunction at the end of the plaint. In the other it would depend on the view, which a Judge might take of the elastic and indefinite expression "serious or irreparable damage," whether the official should have or should lose the benefit of the statutory interval of two months; nor can this difficulty in the least depend on the intention, which may be speculatively attributed to the legislature in prescribing any interval at all.

To some extent the Bombay decisions purport to rest on the authority of English cases, of which the principal are: *A. G. v. Hackney Local Board* (14) and *Flower v. Low Leyton Local Board* (15). These were decided respectively upon the Metropolis Management Act, Amendment Act, 1862, and on the Public Health Act, 1875, and turned on the construction then put on the Public Authorities' protection clauses therein contained. The Public Authorities' Protection Act, 1893, has now repealed these clauses, and has adopted another form, to which the authority of *Flower's* case (15) has not been considered applicable: *Harrop v. Ossett Corporation* (16); *Fielden v. Morley Corporation* (17). In the *Hackney* case (14) Bacon, V. C., held that the words "any act done or intended to be done under their Parliamentary powers" could not apply to a nuisance, to which such powers could not in any case extend. The difficulties of this construction are shown in the judgment of Bowen, L. J., in *Chapman Morsons & Co. v. Auckland Union* (18), where he en-

deavours, but without much confidence, to find a less unsatisfactory basis in the words "writ or process," within which a bill for an injunction might not fall. In *Flower's* case (15) the Court of Appeal held that the Public Health Act, 1875 S. 264, did not extend to a Bill in Chancery, but only to an action at law, a consideration inapplicable to S. 80 of the Civil P. C., and assumed that the object of the delay provided by the section was to give time for a tender of amends. It is to be noted that the Public Health Act, 1875, the previous Act of 1848, and the Metropolis Management Act were cases where a subordinate statutory authority had been entrusted with specific and limited powers, and it would seem from *Davies v. Corporation of Swansea* (19), that the profession had long taken S. 139 of the Act of 1848 to be applicable only to actions of tort. Similarly in *Flower's* case (15) counsel hardly contested that an exception of "cases of necessity," as mentioned in the Court below by Malins, V. C., must be understood. A view, therefore, about a bill for an injunction "against serious and irreparable damage requiring the intervention of the Court," almost undisputed in the Court of appeal, would not be any guide to the meaning of the Civil Procedure Code, where the clause applies to all officers of Government and to all their official acts, and where the words "in respect of," a form going beyond "for anything done or intended to be done" show it to be wider than the statutes, on which the English authorities were decided.

On the other hand, the view which has been taken in the other High Courts may be shortly summarised thus: The argument that a statutory provision as to procedure is subject to some exception of cases, where hardship or even irremediable harm might be caused, if it were strictly applied, might be used with equal cogency in connexion with a Code fixing the admissibility of evidence or with a limitation section, recognizing rights but barring remedies. For this, however, there is no authority. The Act, albeit a Procedure Code, must be read in accordance with the natural meaning of its words. S. 80 is express, explicit and mandatory, and it admits of no implications or exceptions. A suit in

(14) 20 Eq. 626=44 L. J. Ch. 545=33 L. T. 244.

(15) 5 Ch. D. 347=46 L. J. Ch. 621=25 W. R. 545 36 L. T. 760.

(16) [1898] 1 Ch. 525=78 L. T. 287=67 L. J. Ch. 347=46 W. R. 391=14 T. L. R. 308=62 J. P. 297.

(17) [1899] 1 Ch. 1=79 L. T. 231=67 L. J. Ch. 611=47 W. R. 295.

(18) [1889] 23 Q. B. D. 224 at p. 302.

(19) 22 L. J. Ex. 299.

which inter alia an injunction is prayed is still "a suit" within the words of the section, and to read any qualification into it is an encroachment on the function of legislation. Considering how long these and similar words have been read throughout most of the Courts in India in their literal sense, it is reasonable to suppose that the section has not been found to work injustice, but, if this is not so, it is a matter to be rectified by an amending Act. Their Lordships think that this reasoning is right. To argue, as the appellants did, that the plaintiffs had a right urgently calling for a remedy, while S. 80 is mere procedure, is fallacious, for S. 80 imposes a statutory and unqualified obligation upon the Court. So, too, the contention that the "act purporting to be done by the Collector in his official capacity, in respect of which" the suit was begun, was his threatened enforcement of payment is also fallacious, since the illegality, if any, is in the order for recovery of the tax. If that was valid, there was nothing to be restrained. Hence, though the act to be restrained is something apprehended in the future, the act alone "in respect of which" the suit lies, if at all, is the order already completed and issued.

As for the suggestion that S. 80, in such a case as this, is itself ultra vires, it arises from a misapprehension of *Secy. of State v. Moment* (20). The regulation for civil procedure has nothing to do with the obligations formerly vesting in the East India Company as a trading corporation, for it is incidental to the duties of the ruling power and cannot be said to be subject to the Government of India Act, 1858, S. 65.

An attempt was made to distinguish between the effect of S. 80 in the case of the Secretary of State and in the case of the Collector, and to argue that, even if it defeated the action as against the first-named defendant, it would fail to protect the second. Their Lordships cannot accept this. Not only has the suit been throughout a joint proceeding against the officials concerned, for the purpose of getting a joint declaration that the Government Notification was bad as the foundation of everything subsequently done, but, without the presence of the Secretary of State before the Court, the

Notification could not be assailed, and, if it stands as valid, the Collector's own action could not be successfully impugned.

The consequence is that the appellants' present position in regard to the taxes imposed on them is as if their action had never been brought. It was unsustainable in limine. They commenced their suit before the law allowed them to sue, and can get no relief in it either by declaration or otherwise. Whatever may be the case between other parties, as against the respondents, they must fail. They have taken their own course and have brought this result on themselves. The suit was begun and prosecuted as a joint suit to challenge the official action as soon and as completely as possible. The evidence did not prove risk of serious or irremediable damage to anybody, and was not directed to doing so. The sums payable were in many cases very small, and were throughout far from being oppressive. Any sums paid under the Collector's demand would be returnable if that demand was proved to have been bad, and no one of the plaintiffs was shown to have been unable to make the first payment, the only one falling due within the two months. There was no reason for not complying with the words of the section, except over-confidence in what may be called the Bombay view of it. Accordingly, their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

D.D.

Appeal dismissed.

Solicitors for Appellants.—*T. L. Wilson & Co.*

Solicitors for Respondent.—*The Solicitor, India Office.*

A. I. R. 1927 Privy Council 185

(From Ceylon)

16th June 1927

VISCOUNT HALDANE AND LORDS
SHAW AND WARRINGTON

Andrahennedige Dinohamy and another—Appellants.

v.

Wijetunge Liyanapatabendige Balahamy and others—Respondents.

Privy Council Appeal No. 83 of 1926.

(20) [1913] 40 Cal. 391=18 I.C. 22=10 I.A. 48 (P.C.).

(a) *Ceylon Law—Marriage—Persons living as man and wife should be presumed to be legally married.*

According to the law of Ceylon, where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage: *Sastry Velaidar Aronegary v. Sembecully Vailgalle*: (1881) 6 A. C. 364; *Ref. Breadalbane case*, 2 H. L. Sc. 269, *Rel. on.* [P 187, C 1]

(b) *Deed—Execution—Deed involving extinction of rights and degradation of status of one party—Party not protected by notary—Transaction is bad.*

Where a notary was instructed by one party to a transaction involving not only the extinction and alteration of patrimonial rights, but also a degrading alteration of the status and moral life of others who were to be made parties to the deed, but he never suggested that it was a case for another notary being employed to protect the interest of the other party.

Held: that the transaction and the evidence by which it was supported are alike discreditable. It would require the very strongest evidence in such circumstances to prevent the respondents from being protected against such a transaction by a Court of law. [P 188, C 1]

(c) *Deed—Execution.*

Where a deed written in English was signed by a lady who did not know English and the deed deprived her of her legal rights of succession and degraded her status:

Held: that the deed was no bar to her rights under the law. [P 188, C 1]

L. DeGruyther and K. Brown—for Appellants.

H. I. P. Hallett—for Respondents.

Lord Shaw—This is an appeal raising the question of the validity of a Singhalese marriage. A petition was presented by the respondents in the District Court of Tangalla in Ceylon for letters of administration of the estate of one, who for short, may be called Don Andris de Silva. Don Andris died on the 1st September 1921. The application was made, upon the 14th December of that year, by Singho Appu, the son-in-law of the deceased Don Andris. Don Andris died intestate.

The family history of Don Andris was that he had been regularly married in 1885, having as issue the daughter who, through her husband Singho Appu, now claims his whole estate. This first wife died in May 1900.

Then in 1901, and for a course of twenty years until 1921, when Don Andris died, the proved family history was as follows:

He married one Balahamy, with the

procession, the giving of gifts and other ceremonials familiar to the law of Ceylon. There was, however, one omission namely, that the marriage was not registered, and in that sense the marriage was irregular. But registration, however important, was not by law essential. Don Andris and she lived together as apparently man and wife for these twenty years. During that period she bore him nine children, of whom eight are still alive. The father and mother and children all lived together as one family. At the time of his death she and the eight surviving children were living in the family house.

By the law of intestate succession in Ceylon, the estate of the deceased would have been divided, one half to his widow and the other half equally among the nine children, namely, her eight, and the respondent, the child of the first marriage.

The respondents claim that this law of succession operates.

The appellants, however—Singho Appu and his wife—deny to the respondents any such right of succession. They maintain that Balahamy was not the wife of Don Andris, and that all her children were illegitimate. They accordingly claim that Dinohamy succeeded to the whole estate.

In the circumstances mentioned it is not to be wondered at that, when, on the 14th December 1921, letters of administration were granted to the appellant, Singho Appu, as son-in-law of the deceased and husband of Dinohamy, the daughter by the first marriage, he considered it expedient to do something to fortify a claim to the estate. For the result of success in his application would be that the appellants would be able to disinherit and eject from the family home the first respondent and her eight children. A deed, purporting to be a deed of agreement, was accordingly prepared. It was made ready by the 18th December namely, four days after letters of administration; and it was executed on the 23rd December.

It is sufficient to say of that deed that the estate was declared wholly to belong to appellant Dinohamy, the daughter of the first marriage. A certain portion of the property, however—about one half—was to be given by her as a donation to the eight children and

the deed entirely disinherits their mother, who, as the widow of Don Andris, would have succeeded to the other half. It not only, however, does this, but it further states that Don Andris had "lived with the said . . . Balahamy as his mistress and not having legally married her, eight children were born to them." She is accordingly, as stated, entirely disinherited by this alleged agreement.

There are only two real questions in the case:

First, was Balahamy married according to the law of Ceylon to Don Andris?

Secondly, are her or her children's rights affected by the deed of agreement?

The strength of the appellants' case—there being a total conflict between the witnesses on the one side and those on the other—is that the District Judge believed the appellants' witnesses. On the other hand, the two Judges of the Supreme Court of Ceylon, by their judgment dated the 18th December 1925, reversed the District Court's judgment, and on both the points in issue, differed from the learned Judge, disbelieved the witnesses of the appellants, and believed those of the respondents.

It is not disputed that according to the Roman Dutch law there is a presumption in favour of marriage rather than of concubinage; that according to the law of Ceylon, where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage and not in a state of concubinage.

A judgment substantially in these words (*Sastry Velaidar Aronegary v. Sembecutty Vaigalie* (1), was pronounced by this Board through Sir Barnes Peacock. Sir Barnes discusses the law with some fullness, quoting among other cases the opinion of Lord Cairns in *De Thoren v. Attorney-General* (2), and making reference to the Scotch leading case, the *Breadalbane* case (3).

Since the *Breadalbane* case has been mentioned it may be expedient to note these sentences from the judgment of Lord Cranworth therein:

(1) [1881] 6 A. C. 354=50 L. J. P. C. 28=14 L. T. 895.

(2) [1876] 1 A. C. 686.

(3) H. L. Sc. 269.

Marriage can only exist as the result of mutual agreement. The conduct of the parties, and of their friends and neighbours, in other words, *habite* and *repute*, may afford strong, and, in Scotland, attending to the laws of marriage there existing, unanswerable evidence, that at some unascertained time a mutual agreement to marry was entered into by the parties passing as man and wife. I cannot, however, think it correct to say that *habite* and *repute* in any case make the marriage. *Repute* can obviously have no such effect. It is, perhaps, less inaccurate to speak of *habite* creating marriage if by the word '*habite*' we are to understand the daily acts of persons living together, which imply that they consider each other as husband and wife, and it may be taken as implying an agreement to be what they represent themselves as being. It seems to me, however, even here to be an improper use of the word to say that it makes marriage. The distinction is, perhaps, one rather of words than of substance; but I prefer to say that *habite* and *repute* afford by the law of Scotland, as, indeed, of all countries, evidence of marriage, always strong, and in Scotland, unless met by counter evidence, generally conclusive.

Whether this distinction be merely one of words rather than one of substance does not, in the present case, really arise; because in their Lordships' opinion the evidence in this case comes up to the full measure of what would be demanded either in England or in Scotland or Ceylon, namely, it is unanswerable and conclusive evidence.

The parties lived together for twenty years in the same house, and eight children were born to them. The husband during his life recognized, by affectionate provisions, his wife and children. The evidence of the Registrar of the District shows that for a long course of years the parties were recognized as married citizens, and even the family functions and ceremonies, such as, in particular, the reception of the relations and other guests in the family house by Don Andris and Balahamy as host and hostess—all such functions were conducted on the footing alone that they were man and wife. No evidence whatsoever is afforded of repudiation of this relation by husband or wife or anybody.

The learned Judges of the Supreme Court have discussed the evidence carefully, and have come to these conclusions. The Board thinks they are right.

The second point has reference to the alleged deed of agreement. It has already been noted as remarkable that Singho Appu thought it right within a few days of letters of administration being granted to him to fortify his and his wife's position by getting an agreement

of the kind. The facts with regard to it are that the widow gave no instructions for its preparation; that she was not consulted as to its provisions; that she obeyed a message to go to Singho Appu's house, and that she there, at his request, signed the deed. She had no legal adviser. The deed was in English, but she could not read English. She says that she understood she was required to put her name to it because it concerned her half of the estate, but that she did not know anything else. It is almost beyond reason to expect that she would have knowingly signed a deed declaring that she herself had lived with Don Andris for twenty years as his mistress, and that all her children were illegitimate children.

The most careful examination of the conduct of the notary in such a case must be made. Its outstanding feature is that being instructed by one party to a transaction involving not only the extinction and alteration of patrimonial rights, but also a degrading alteration of the status and moral life of others who were to be made parties to the deed, he never seems to have suggested that it was a case for another notary being employed to protect the wife and children's interests. The transaction and the evidence by which it was supported are alike discreditable. It would require the very strongest evidence in such circumstances to prevent the respondents from being protected against such a transaction by a Court of law. Their Lordships agree with the Supreme Court that it is not proved that the wife understood, or had sufficiently explained to her, this deed written in a foreign tongue, and think it is no bar to her and her children's rights under the Ceylon law of intestate succession.

Their Lordships do not enter further into the facts of the case as, for instance, the entries upon the register and other topics—upon all of which topics the Board agrees with the Supreme Court.

Their Lordships will humbly advise His Majesty that the appeal should be disallowed with costs.

D.D. *Appeal disallowed.*

Solicitors for Appellants—*Freeman & Cooke.*

Solicitors for Respondents—*O. A. Cayley.*

* * A. I. R. 1927 Privy Council 188

(From British Columbia)

20th June 1927

VISCOUNTS HALDANE AND SUMNER, AND
LORDS SHAW, MERRIVALE AND
WARRINGTON

Capt. J. A. Cates, Tug and Wharfage Co., Ltd.—Appellants.

v.

The Franklin Fire Insurance Co. of Philadelphia, Pennsylvania—Respondents.

Privy Council Appeal No. 50 of 1927.

* (a) *Contract—Offer and acceptance—Assured tendering notice of abandonment of boat insured against total loss on boat being sunk—Notice not accepted—Boat raised—Underwriters inviting offer from salvors for purchase of the boat does not constitute acceptance of abandonment.*

The appellants were the owners of a boat. She was covered by policies of insurance issued by the respondents against total loss. The policies contained the words "to follow Hull underwriters in the event of total or constructive or compromised total loss." The boat was sunk in collision and the plaintiffs sent to the underwriters' agents notice of the accident and further notice of abandonment which was refused by the respondents. The boat was raised by the underwriters through salvors and while the surveys and estimates were being made for repairs the salvors asked the underwriters' representatives whether, if the wreck were to be sold they will be given a chance to purchase. The salvors were asked to put their offer into writing which was done but after some interval it was withdrawn.

Held: there had been no acceptance of the abandonment which had been tendered by the assured. The underwriters in this tentative negotiation did not act as owners of the boat or exercise dominion over it and they did not prefer to sell or convey or to make a title for that purpose. The analogy of goods sold by sample or delivered on approbation to a person who thereupon sells them to a third party and so determines his right to elect whether he will take the goods or return them cannot be adopted in such a case. [P 188, C 2, P 189, C 1]

* (b) *Insurance—Marine—Ship insured against total loss—Sinking of ship is not necessarily total loss.*

A ship is not an actual total loss whenever she is under water, nor even when she is submerged in such circumstances as to present the salvors a problem of some difficulty. [P 191, C 1]

J. A. MacInnes—for Appellants.

W. M. Griffin—for Respondents.

Viscount Sumner.—The appellants were the owners of the motor tug-boat "Radius" when she was sunk in collision just outside the entrance to Burrard Inlet, the harbour for the City of Van-

couver, on the 26th August 1925, and went down in about fifteen fathoms.

She was covered at the time by two policies of insurance, issued by the respondents, one for \$24,000, so valued, on hull (\$12,000), and machinery (\$12,000), against all risks, and the other on disbursements for \$6,000 on the like value against total or constructive total loss only, with a limited part of any general average and salvage. Both policies contained the following clauses:

In ascertaining whether the vessel is a constructive total loss, the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account . . . Warranted to be subject to English Law and usage as to liability for and settlement of any and all claims,

and also sue and labour clauses in the usual terms. The disbursements policy further contained the words

to follow Hull underwriters in the event of total or constructive or compromised total loss.

The plaintiff company sent to the underwriters' agents notice of the accident on the day of the collision and notice of abandonment on the day after, which on the 3rd September the respondents refused in writing to accept "at that stage." Prompt arrangements were also made by the agents to ascertain the exact position of the sunken tug. This was done without difficulty, oil being observed on the surface in the neighbourhood of the place of collision. The spot was buoyed on the 27th August, and on the 28th August a diver was sent down, who reported the tug to be resting on the bottom there, right side up, and though holed in one place amidships otherwise apparently undamaged. Thereupon a contract was made with salvors on the 29th August to raise her for \$6,500, no cure, no pay, and by the 2nd September she had been raised and towed inshore. Next day she was beached and the hole was temporarily patched. Examinations and surveys followed, those made for the underwriters being detailed surveys by skilled surveyors, those on the other side amounting to little more than a general look round without detailed estimates.

The result was that the appellants were advised by one witness (Moscrop), thus:

I didn't think she would be worth fixing up. I thought it would be cheaper to build a new boat and put the money in that,

and by another (Lucas), that the cost of repairing the engine would be probably four or five thousand dollars, which would make it worth about five thousand.

On the other hand, detailed estimates, based on the surveys, were furnished to the underwriters and tenders to do the work were made by responsible ship-repairers at Vancouver for amounts ranging from \$10,348 to \$14,730. There were further admitted items for expenses of various kinds, amounting to \$3,042. The appellants' witnesses did not address themselves to the points that the expense of repair had to be compared with an insured value of \$24,000, or realise that the question could not be solved by asking merely whether it would pay the owners best to abandon at the outset and buy a new tug or to undertake the work of effecting the necessary repairs. On the underwriters' figures, which were the only figures presented "in accordance with English usage in the settlement of claims," there could be no constructive total loss, unless the highest estimate and no other was adopted, and even then the margin would only be \$27,210.

While the surveys and estimates were being made the salvors happened to ask the underwriters' representative whether if the wreck were to be sold, they could be given a chance to purchase. A non-committal reply was given at the moment, but a little later an offer of \$12,500 was made by word of mouth, to include the \$6,500 salvage. In return a request was made that the offer should be put into writing, which was done, but after an interval of some three weeks this offer was withdrawn. The appellants knew nothing of this incident until after litigation had begun, so that, whatever else may be made of it, estoppel, on the basis of a representation available to the appellants and a consequent change of position on their part is out of the question.

It was on this incident that the judgment turned, which the trial Judge gave in favour of the appellants for a total loss. He held that, by reason of these communications between the underwriters and a third party, there, had been a binding acceptance of the abandonment, which had been tendered by the assured, in spite of their formal refusal of it. He held that they had

done an act which could only be justified under a right derived from abandonment, "for" said he, "does not the solicitation and receipt of a bona-fide bid to purchase necessarily imply power to make title should the bid be accepted?" Their Lordships can only say, as the Court of appeal said, that it does not. The underwriters in this tentative negotiation did not act as owners of the tug or exercise dominion over it, and they did not purport to sell and convey or to make a title for that purpose. An agreement to sell, had it been concluded, would only have been an executory contract, which they would be able to perform if and when they chose to accept the abandonment, but in itself it could not be an act of ownership. As a matter of fact, this everyday proceeding was nothing more than a precaution, equally available in connexion with proving a defence in case they should resist the claim or with preparing to make the best of the loss if they should give up the contest and elect to pay. The analogy of goods sold by sample, or delivered on approbation to a person, who thereupon sells them over to a third party and so determines his right to elect whether he will take the goods or return them, is one which, though it was urged on their Lordships by counsel at the bar, it is impossible to adopt.

As the trial Judge had not tried the issues of actual, constructive or partial loss, or of the amounts payable accordingly, the Court of appeal proceeded to determine them on the shorthand notes of a very copious examination and cross-examination of the witnesses on both sides. To this course no objection was taken. The plaintiffs did not seek to have the case sent back to the trial Judge to complete the hearing; the defendants were content to take the decision of the Court of Appeal. In the result the Court, having the fullest materials before them on questions which are essentially questions of figures and of fact and depended little on the credibility of the respective witnesses, came in effect to the conclusion that the loss was not an actual total loss, for the tug was clearly capable of being salvaged and repaired, as any prudent uninsured owner would have seen; that, on a comparison of the aggregate cost of salvage, repairs and incidental expenses with the insured

value, there was such a margin as made the loss partial only, and that as to the amount of that partial loss the \$11,500, tendered before action and paid into Court, taken together with the amount of the salvage bill, which underwriters had discharged, sufficed to satisfy the assured's claim.

The contentions of the appellants, before their Lordships were: (1) that there was a constructive total loss, because the assured had been "deprived of the possession of his ship . . . by a peril insured against," and because it was unlikely that he could recover (Marine Insurance Act, S. 60 (2)), unlikely, that is, at the time when he gave his notice of abandonment; and (2) that when the tug went to the bottom there was an actual total loss, in accordance with Lord Halsbury's well-known observation in the case of the "Blairmore" (1898, A. C., at p. 593).

In this case a controversy has been raised which I had thought had long since been laid to rest . . . "I myself should say a ship was totally lost when she goes to the bottom of the sea, though the modern mechanical skill may bring her up again, and I think, in construing a contract, now for many years a common contract, no one could doubt that that contract was intended by the parties to complete the loss of a ship as comprehending the case of her being sunk.

The first contention is disposed of at once as soon as it is appreciated how probable the recovery of the tug was, even when the notice of the abandonment was given. The tug had sunk near to a great city and within the neighbourhood of its harbour. Skilled persons and modern appliances were available to raise her. The weather caused no difficulties: the exact spot where she sunk was easily ascertained. She was neither very large nor very heavy. The diver at once found that she rested conveniently on a gravel bed and was neither broken up nor in danger of going to pieces. Experience at Vancouver showed as experience has shown in many other similar places, that it was quite a feasible operation to raise such a vessel. Even the depth in which she lay, and the fear, in any case rather a remote one, that tides and currents might have shifted her position into much deeper water, was at once found to have nothing in it. The appellants accordingly failed to bring themselves

within S. 60 (2), and it is unnecessary to consider the question which has been raised (see Arnould on Marine Insurance, 11th Ed., S. 1097), whether or not the old rule, which makes the commencement of the action the crucial moment in considering whether a constructive total loss has occurred, has been modified by Ss. 61 and 62.

As to the second argument, Lord Halsbury's observation has unfortunately been so applied in this case as in itself to re-awaken controversies, which in his time were well settled. If Lord Halsbury meant to decide that, when the "Blairmore" sank, she was, then and there, totally lost, the whole discussion on which the rest of his judgment and the judgment of his colleagues turn, was otiose, nor was any notice of abandonment required at all. So far, however, from the action being, as in this view it was, for an actual total loss, it had from the first been brought for a constructive total loss (24 Rettie 893), and the issue was whether, by raising her at their own expense, the underwriters could insist on eliminating this item of salvage from the comparison between her repaired value and the costs of putting her in a position to be repaired and of then repairing her, and could on this footing successfully aver that there was only a partial loss, namely, the cost of the repairs themselves (Lord Watson, pp. 601 and 602; Lord Herschell, p. 610). What Lord Halsbury said was not necessary to the decision nor was it part of the reasoning on which the decision of the house was based, and it expresses only his opinion at that time on the particular fact the case presented, viz., that this ship had been sunk in a squall in sixty fathoms (24 Rettie at pp. 898), while laid up in ballast in San Francisco Bay in the year 1896. The physical possibility of raising a sunken ship depends not only on the place where she lies, her size and injuries, and the available facilities for salvage work, but also on the existing state of the salvors' art, which, since 1896, has made very considerable advances. Lord Halsbury's remark must not be taken as meaning that any ship is an actual total loss whenever she is under water, nor even when she is submerged in such circumstances as to present to salvors a problem of some difficulty. It does not

therefore, avail to relieve the appellants from the necessity of proving a constructive total loss in this action.

The rest of the case raises questions of figures only, as to which the Court of appeal had materials fully sufficient to justify their findings without being open to review except upon questions of principle. It was argued that such a question was to be found in the estimates of the cost of repairs presented by the underwriters, and that, as against them, the assured was entitled to pin them down to their highest estimate, since all were put forward as worthy of credit and none could, therefore, be described by the underwriters themselves. There is one obvious fallacy in this ingenious argument. This evidence was not given in respect of a fact, which was within the cognisance of those who presented it. The subject was a matter of opinion and was strictly one of estimate, not of knowledge. The witnesses were qualified technically, and their business was by their special skill, to assist the Court in solving the question in issue, namely, the true cost of repairs. On their evidence the Court had to exercise a judicial selection and this was properly done, nor can their Lordships now review it. A figure was chosen, which failed to establish either a constructive total loss or a partial loss to an amount in excess of the aggregate of the sum paid into Court and of the salvage service, of which the plaintiffs had the gratuitous benefit, and with this conclusion their Lordships do not interfere. They will accordingly humbly advise His Majesty that this appeal ought to be dismissed.

G.B.

Appeal dismissed.

Solicitors for Appellants—*Johnson, Jacks and Calclough.*

Solicitors for Respondents—*W. A. Crump and Sons.*

*** * A. I. R. 1927 Privy Council 191**
(From Lahore)

23rd June 1927

LORDS SINHA, BLANESBURGH,
SALVESEN, SIR JOHN WALLIS AND
SIR LANCELOT SANDERSON
Balla Mal and others—Appellants.

v.

Ata Ullah Khan and others—Respondents.

Privy Council Appeal No. 21 of 1926.

* * *Mussalman Waqf Validating Act (1913)*—*Act is not retrospective—For validity of waqfs prior to the Act there must be substantial dedication to charitable purposes—Settlor may provide for himself and his dependents for their lives—Provisions of the deed must be looked to rather than the language.*

The Mussalman Waqf validating Act has no retrospective operation. Under the Act a waqf is not rendered invalid because it appears that the main object of the settlor was to make a settlement of the property on his family rather than to devote it to what are ordinarily understood as charitable purposes whereas with regard to waqfs created before the passing of the Act the test still is 'Was there a substantial dedication of the property to charitable purposes.' The test may sometimes be difficult of application and in applying it the Courts, especially since the passing of the Act, will not be disposed to construe the provisions of the deed too strictly, but the question must remain whether the properties have been substantially dedicated to charity or whether they have been put into waqf by the settlor with the real object of effecting some non-charitable purpose for instance, that of making a family settlement of his property which would otherwise be invalid as opposed to the Mahomedan law of succession. The settlor may make provision for the maintenance of himself and of those who are dependent on him for the terms of their lives. Such provisions would in no way be inconsistent with a substantial dedication to charity. On the other hand, if it should appear that the bulk of the income was settled on the line of the descendants and need only to be given to charity on failure of such line an event which might be indefinitely postponed then the fair inference might be that his object was to make a settlement on his family which would not otherwise have been possible and that property settled on such terms should not be properly said to be substantially dedicated to charity. [P 192 C 2 ; C 193 C 1]

In considering this question regard must be had to the provisions themselves rather than to the language in which they are expressed. Because even where the intention is not to make a substantial dedication to charity, the object of the draftsman would be to make it appear as far as possible that it was so. [P 193 C 1]

It must be noted that the properties must be substantially dedicated to charity and not that the gift to charity should be substantial: *A. I. R. 1922 P. C. 107* ; *A. I. R. 1916 P. C. 86* ; *17 Cal. 498 (P. C.)* and *23 All. 233 (P. C.) Ref.* [P 195 C 1]

G. R. Lowndes and *B. Dube*—for Appellants.

L. De Gruyther and *J. M. Parikh*—for Respondents.

Sir John Wallis.—On the 16th March 1907, the late Mian Muhammed Bakhsh executed a wakfnama or a deed of wakf, by which he purported to dedicate all his remaining properties to charity subject to certain provisions for his own maintenance and the maintenance of the people who had claims on

him. He died within the year, on the 15th January 1908, and thereupon his son Nasir-ud-Din took possession of the properties, successfully opposed the application for mutation of names made on behalf of the present plaintiff, who was then a minor, as mutawalli of the wakf, and remained in possession until his death in July 1913. In the following year, the house property included in the wakfnama was attached in execution by one of his creditors, and the plaintiff's objections as mutawalli to the attachment having been disallowed, he filed the present suit by his next friend to establish the rights of wakf.

The Subordinate Judge at Amritsar and the High Court at Lahore both decided in his favour, and the defendants, who represent the attaching creditors, then obtained leave to prefer the present appeal to His Majesty in Council. The only question argued before their Lordships was whether under the wakfnama the properties of the settlor were validly dedicated to charitable purposes and it was admitted that, if the wakfnama had been executed subsequently to the passing of the Mussalman Wakf Validating Act, 1913, it would not have been open to objection. It has, however, been ruled by the Board in *Khajeh Solehman Quadir v. Salimullah Bahadur* (1) that the Act has no retrospective operation and it therefore becomes necessary to examine the provisions of the deed in the light of the decisions of the Board as to wakf which were unaffected by the Act. Under the Act a wakf is not rendered invalid because it appears that the main object of the settlor was to make a settlement of his property on his family rather than to devote it to what are ordinarily understood as charitable purposes, whereas, with regard to wakfs created before the passing of the Act, the test still is as laid down by the Board in *Md. Asanullah v. Amarchand* (2), *Mujibunnissa v. Abdul Rahim* (3), *Ramanadan Chettyar v. Levval Marakayar* (4) and *Khajeh Solehman Quadir v. Salimullah Bahadur* (1), was there a substantial dedication of the

- (1) *A. I. R. 1922 P. C. 107=49 Cal. 820=49 I. A. 153 (P. C.).*
- (2) *[1890] 17 Cal. 498=17 I. A. 28=5 Sar. 476 (P. C.).*
- (3) *[1921] 23 All. 233=28 I. A. 15=7 Sar. 829 (P. C.).*
- (4) *A. I. R. 1916 P. C. 86=40 Mad. 116=44 I. A. 21 (P. C.).*

properties included in the wakf to charitable purposes? The test may sometimes be difficult of application, and in applying it the Courts, especially since the passing of the Act, will not be disposed to construe the provisions of the deed too strictly; but still the question must remain whether the properties included in the wakf have been substantially dedicated to charity or whether they have been put into wakf by the settlor with the real object of effecting some non-charitable purpose such as, for instance, that of making a family settlement of his property which would otherwise be invalid as opposed to the Mahommedan law of succession.

In the present case Mian Muhammed Bakhsh had already made a charitable disposition, in accordance with his means by the creation of an earlier wakf, which is mentioned in the deed; and it appears fairly clear that it was because Nasir-ud-Din, his only son, was a man of bad character, that he decided to put the rest of his property into wakf. This he was at full liberty to do, provided that he devoted it substantially to charity. Further, seeing that he was putting all his remaining property into wakf, it necessarily followed that he must be at liberty to make some provision for the maintenance of himself and of those who were dependent on him for the term of their lives, and such provisions would be in no way inconsistent with a substantial dedication to charity. On the other hand, if it should appear that the bulk of the income was settled on the line of his own descendants, and need only go to charity on failure of such line, an event which might be indefinitely postponed, then the fair inference might be that his object was to make a settlement on his family which would not otherwise have been possible, and that property settled on such terms could not properly be said to be substantially dedicated to charity.

Lastly, in considering this question regard must be had to the provisions themselves rather than to the language in which they are expressed, because even where the intention was not to make a substantial dedication to charity, the object of the draftsman would be to make it appear as far as possible that it was so.

With these observations their Lordships will proceed to examine the provisions of the deed, of which the material terms were as follows:

sions of the deed, of which the material terms were as follows:

I, Muhammad Bakhsh, son of the late Mian Saudagar of Nurpur, Caste Gill, resident of Amritsar, Katra Ghanayau, do hereby declare as follows:

The immovable estate, mentioned below, is exclusively owned, acquired, built and founded by me without the partnership of anybody else and the same is in my proprietary possession. I follow the Mahomedan Law. . . .

Since with the object of earning reward in the next world as well as in this world I have for a long time been maintaining the poor, the needy, the servitors at the Mosque, students receiving religious education, widows, revered Sayeds, and orphans, in general, and the under-mentioned persons (who are my kith and kin), in particular, thinking the same to be a good deed, and I have for a long time been cherishing the idea that the said good work should continue even after my death and that the said persons should be looked after and maintained as before even after my death, as I have been looking after and maintaining them during my lifetime. Therefore I, in order to complete and accomplish the said object, have hereby, of my own accord and free will while in the enjoyment of my right senses and sound health and without the inducement of any other person, made the entire aforesaid property wakf from to-day, and giving up my proprietary rights in toto I agree.

. . . The entire income from the said property (after it has been deposited with the Mutwalli for the time being and after the expenses, in connexion with the Government demands, pay of the servants engaged for the above-mentioned wakf property, repairs, and other expenses which may be necessary for the said property, and also the expenses in connexion with the disputes over the said property have been deducted therefrom) shall, through the Mutwalli, be divided half-yearly at the time of kharif and rabi harvests amongst the following persons:

1. The poor, the needy, the Sayeds, servitors at the Mosque, students receiving religious education, widows, orphans, without distinction of name and place Rs. of residence 73
2. I, who make the property wakf, for my own maintenance 250
3. Nasir-ud-Din, my son 120
4. Musammat Sardar Begum, wife of my son, so long as she remains abad with my son as his wife 120
If my son divorce her and she, even then, lives with me, obediently to me, and leading a life of chastity, and acts in accordance with my directions, she would get 60
5. Musammat Iqbal Bibi, wife of Abdul Ahad, and Abdul Ahad, Kureshi, and their direct lineal descendants 60
6. Ghulam Hassan, son of Azim Bakhsh, and Mt. Sahibo, widow of Azim Bakhsh, deceased 60
7. Musammat Rabia, daughter of Nabi Bakhsh, my brother-in-law (wife's brother) 60
8. Musammat Ghulam Fatima, wife of Sultan 24
9. Musammat Azizan, daughter of Ghasita, my mother's sister's daughter 12

10. In case the income from the estate after deduction of the aforesaid expenses is not so sufficient as may be divided amongst the persons mentioned in paragraphs Nos. 2 to 9 according to their respective fixed shares, the fixed amount of each one's share shall be decreased proportionately.

11. In case the income from the estate after deduction of the expenses, and after setting apart the stipend of each of the aforesaid persons, exceeds, the surplus amount shall be given to the Muhammadan schools alone mentioned in paragraph No. 1 as desired by the Mutwalli.

12. In the event of the death of any of the persons mentioned in paragraphs Nos. 2 to 9, the money allotted to his (or her) share shall be given proportionately to the other persons who may be alive or to some of them or to any one of them whom the Mutwalli thinks it proper to give, or the Mutwalli himself, according to his choice, shall give as much of it to the persons mentioned in paragraph No. 1 as he thinks proper.

15. The Mutwalli for the time being shall continuously receive Rs. 120 out of the income half-yearly as compensation for his services rendered in connexion for his supervision and management of the said property made wakf. The said amount shall also be considered as forming part of the expenses in connexion with the said property.

19. The sums which have been allotted as stipends to the persons mentioned in paragraphs Nos. 6 to 9 have been allotted in the name of God to earn reward simply on the understanding that they, being helpless widows, orphans and needy, cannot maintain themselves, but that they stand in need of support. For this reason the entire amount to be given in the name of God, shown in paragraphs No. 1 and Nos. 6 to 9, shall be considered to be Rs. 199 in all for each half-year in addition to the amount which shall be given under paragraph No. 12.

21. If none of the persons mentioned in paragraphs Nos. 2 to 9 remains alive, all the sums allotted to them shall, in the name of God, be wholly and solely spent for the poor, the orphans, the needy, Sayeds, servitors at Mosques, students receiving religious education, widows and for other lawful charitable purposes.

22. I will remain Mutwalli of the said estate till my lifetime. After my death, only that person shall be the Mutwalli whom I appoint as such by virtue of a written will bearing my signature. In the event of my not appointing any Mutwalli by virtue of a written will signed by me, the male member of my family, who will be fit, honest and debtless, and is of good character, shall be the Mutwalli. After the appointment of the said Mutwalli, if my son Nasir-ud-Din bears a good character and is debtless, and lets Mt. Sardar Begum live in his house lovingly and peacefully, then, under such circumstances, after a period of three years the person named above can be Mutwalli of the property made wakf. After Nasir-ud-Din, his direct male lineal descendants can be successively appointed Mutwallis and can, in my place, be entitled to get my whole maintenance allowance. In case there is no male descendant from the line of

Nasir-ud-Din, Dear Ata Ullah Khan, son of Raja Allah Dad Khan, shall be the Mutwalli and shall be entitled to get the said maintenance allowance. When my line of descent or that of my brother, Ghulam Rasul, becomes extinct, the then Anjuman Islamia, Amritsar, can be the Mutwalli of the property made wakf. But so long as my line of descent and that of my brother Ghulam Rasul (no matter if there remains only one person alive), do not become extinct, the said Anjuman shall in no way, interfere in the trust of the said property.

24. I, as Mutwalli and as the person making the property wakf, shall, till my lifetime, reside in the Haveli, made wakf, situate in Amritsar, Katra Ghanayan. After me, Nasir-ud-Din, my son, with his wife and children, and Ghulam Hassan with his family, and Mt. Sabibo mother of Ghulam Hassan, shall reside in the said Haveli till their lifetime.

The first thing to be observed about these provisions is that out of the annual expenditure of Rs. 1,558, provided for in paragraphs 1 to 9, Rs. 146 are applied for purely charitable purposes, Rs. 1,100 for the support of the settlor and his family, and Rs. 312 for the support of the dependants mentioned in paragraphs 6 to 9. If the Rs. 146 devoted to charity were necessarily to be increased as the life annuities fell in, there could, in their Lordships' opinion, be no question as to the validity of the wakf. Unfortunately, this is not the scheme of the deed. Under paragraph 12, as the annuities fall in, the money allotted for them is to be divided by the mutawalli proportionately among the surviving annuitants, or be given in his discretion to some or one of them, or he is to give as much as he thinks proper to the persons mentioned in Article 1, that is to say, for purely charitable purposes.

Further, it is to be observed that even this provision is not applied unconditionally to the amount of Rs. 500 reserved for his own maintenance. In paragraph 22, which confers the office of mutawalli, after his own death conditionally on his son, and failing this, on his son's descendants and afterwards on his male agnates, and on failure of that line on the Anjuman at Amritsar, he provides that while the office is held by his descendants or agnates, they are to have the annuity of Rs. 500 reserved for his own maintenance in addition to the mutawalli's salary of Rs. 240, provided for in paragraph 12.

Paragraph 24 also confers upon his son with his wife and children and upon some of the dependants mentioned in

paragraphs 6 to 9 a right to reside in the family house for life.

The result is, that so long as there are agnates of the settlor in whom the office of mutawalli can vest, the mutawalli is to get an amount of Rs. 500 in addition to his salary of Rs. 240 as mutawalli, and the mutawalli is also to pay the descendants of the settlor's daughter, so long as there are any, annually Rs. 120 and so much of the remaining lapsed balance as he chooses. He is not under any obligation to spend any of this sum for charity, though it is in his discretion to do so. In these circumstances, it seems difficult to say that the properties have been substantially dedicated to charity. Here it is necessary to observe that the law as laid down by the Board is that the properties must be substantially dedicated to charity, not, as one of the learned Judges of the High Court has observed in passing orders on the application for leave to appeal, that the gift to charity should be substantial. It appears to their Lordships that the wakf in question fails to satisfy this test, and they will accordingly humbly advise His Majesty that the appeal be allowed and the suit dismissed with costs throughout.

D.D.

Appeal allowed.

Solicitors for Appellants—*Hy. S. L. Polak.*

Solicitors for Respondents—*T. L. Wilson and Co.*

* A. I. R. 1927 Privy Council 195

(From Calcutta)

27th May 1927

VISCOUNT SUMNER, LORDS ATKINSON
AND CARSON

M. A. Sassoon and Sons, Ltd.—Appellants.

v.

The International Banking Corporation—Respondents.

Privy Council Appeal No. 99 of 1926 :
Calcutta Appeal No. 65 of 1925.

* (a) *Negotiable Instruments—D/A drafts—Discounting with a bank—Confirmed credit therefor provided in another bank—Drafts dishonoured after acceptance—Documents of title delivered to consignee on acceptance of drafts—Claim against drawers—Delivery of documents*

not unreasonable—Drawers are liable in the absence of express contract negating recourse or breach of contract or other duty having that effect—Discounting is not an out and out sale.

In respect of a certain forward contract for sale of goods entered into by S. & Co. with K. & Co., the buyers K. & Co. had arranged with E Bank for credit to be available for the discount of the drafts to be drawn in respect of the shipments and S. & Co. were informed by the E Bank that the latter were prepared to make advances and or negotiate the drafts if presented to them with their relative bills of lading, invoices and policies and that the above credit was a confirmed one. In respect of August shipment under the contract S. & Co., drew D/A drafts on K. & Co. making the bills of lading deliverable against acceptance of the drafts by K. & Co. and discounted the drafts not with E Bank, but with another bank, I bank. The memorandum requesting the I Bank to discount the drafts bore the words "for our 3 M/St D/A drafts on K. & Co. drawn under I/Agreement signed with E Bank". The I Bank delivered the documents to K. & Co. on their acceptance of the drafts and on dishonour at maturity by the acceptors, sued the drawers S. & Co. The defendants contested their liability on the ground that by reason of the discounting transaction, the delivery of the bill of lading to the E Bank became a matter of contract between the parties and that the plaintiff's right of recourse against the defendants was suspended and became ineffectual unless and until the E Bank made default and further that by the delivery of the bills of lading to K. & Co. the plaintiff had impaired the defendants' security of recourse against E Bank available under the confirmed credit.

Held: that having regard to the description of the drafts as D/A drafts, the conduct of the plaintiffs in handing over the bills of lading against the consignees' acceptance was not unreasonable and that any rights of recourse against the E Bank, which might have been available to the plaintiff under the confirmed credit of the E Bank, would not impose on them a duty towards the defendants so as to modify their ordinary right of recourse against the drawers under the drafts. To limit the plaintiff's prima facie right of recourse against the defendants, the former must show that when they discounted the drafts, they bargained that the transaction should be without recourse, or some breach of contract or duty on their part which would have that effect in law.

Mere negotiation of the drafts pursuant to exchange broker's contract was in itself an out and out purchase of them by the Bank without recourse to the drawers in any event.

* (b) *Deed—Construction—Printed form with clause deleted—Same effect as if non-existent.*

The effect of deleting words in a printed form of mercantile contract was the same as if the deleted words had never formed part of the print at all. [P 198 C 2]

F. B. Merriman and J. Nissim—for Appellants.

Herbert Cunliffe and M. R. Jardine—for Respondents.

Viscount Sumner.—The appellants in this case were sued in the High Court at Calcutta, as drawers of four bills of exchange, by the respondents, who discounted them, the bills having been dishonoured at maturity by the acceptors, Messrs. George Knowles and Company, Limited, of London. The decision went against them both at the trial and on appeal, but the High Court granted their certificate for leave to appeal to His Majesty in Council.

The appellants are export merchants in Calcutta, and on the 9th August 1923, they offered two drafts for discount to the respondents, who are bankers there. Two others for the same amounts were sent on the 6th September. The second transaction was a mere transaction of course, following on the first.

The documents were put before Mr. Thompson, the respondent's manager, and on his approval of them the drafts were discounted. In addition to the two drafts, there were a bill of lading for 25 bales of gunnies to be delivered at Dundee and an invoice and mills' specification relating to them. By arrangement, an insurance policy was to be and was produced in England and it need not be further referred to. There was, further, a letter of advice, dated the 18th June 1923, from the Eastern Bank, Calcutta, to Messrs. Sassoon and Company, and a memorandum from Messrs. Sassoon and Company, containing their request for discount, the amount to be passed to their credit.

This memorandum showed a conversion of the amounts of the two drafts, viz., £696 10s. 0d. into rupees at 1s. 4 3/16d., as per Messrs. T. S. Apear and Company's contract, dated the 11th May 1923, being the amount for which credit was asked. The drafts were thus described: "For our 3 M/St. D/A drafts 2048 and 2048A on Messrs. George Knowles and Company, Limited, London," and they bore the words "value received for 25 bales gunnies shipped per s.s. 'Malancha' to Dundee drawn under L/Agreement No. 237, dated the 30th May 1923, signed with the Eastern Bank, Limited, London, as per advice dated the 18th June 1923"; but, except as showing the existence of some relevant agreement, with particulars to identify it and connect it with this particular transaction, these words do not carry the present case any fur-

ther. The bill of lading for twenty-five bales of gunnies shipped by J. S. Ezra made the goods deliverable to order, and was dated the 2nd August, and the invoice, dated the 8th August, was an invoice of goods by Messrs. Sassoon and Company for account of Messrs. George Knowles and Company, Limited, for the net amount of £696 10s. 0d.

Although in the evidence nothing was specially disclosed as to the relations of Messrs. Sassoon and Company and Messrs. Knowles and Company, the transaction, so far, was of the most ordinary type. The contract with Messrs. Apear had been made by that firm as exchange brokers between Messrs. Sassoon and Company and the International Banking Corporation. Messrs. Sassoon and Company having sold the gunnies forward to Messrs. George Knowles and Company, wished to protect themselves against fluctuations in sterling exchange before the shipping date arrived. Accordingly, they at once made a contract, by which they became entitled to discount for their approved drafts later on at the rate current on the day of the contract itself. They were, in a word, content with their profit on the sale, and had no mind to speculate in exchange as well.

On examining the documents put before him, Mr. Thompson apprehended the nature of the transaction above stated quite as fully as was necessary, though Messrs. Knowles and Company and the terms of their purchase contract were unknown to him. Messrs. Apear's exchange contract was for "approved bills of exchange, drawn at 3 M St. D/A on London at the exchange of 1s. 4 3/16d. per rupee," with certain options for shorter or longer terms at rates fractionally higher or lower as specified, and the letter of advice from the Eastern Bank, Calcutta, sufficed, even if Messrs. Sassoon and Company's name had not done so, to secure his approval of the drafts on behalf of the respondent bank. Accordingly, Mr. Thompson passed on the shipping documents to be examined by his shipping department and, being found in order, they were sent with the discounted drafts to London to be dealt with there. The form in which the International Banking Corporation instructed their London correspondents, was of course a domestic matter and gave the appellants no further rights. The obli-

gations arising out of the discounting of the drafts under the circumstances of this case were obligations which, as between these parties, arose in Calcutta. As the letter of advice required, the amount and date of this discount transaction were endorsed on it and stamped with the respondent bank's name. Messrs. Sassoon and Company got credit for their Rs. 10,326-7-9. On the other hand the respondents' correspondents in London, duly following out their instructions, presented the drafts for acceptance to Messrs. Knowles and Company on the 28th August, and acceptance being duly given, handed over the documents to them. Unfortunately, the acceptances were all dishonoured at maturity, in the case of the first two at the beginning of December. The events relating to the other two drafts sued on were in all respects similar, and do not require to be further mentioned.

On the face of the bill transaction, the respondents were entitled to recourse against Messrs. Sassoon and Company. By their pleadings, the latter contended that, pursuant to Messrs. Apear's exchange contract, the International Banking Corporation purchased the drafts and no longer had the right of recourse against the drawers, that would prima facie have belonged to the holder for value; that in view of the existence of a confirmed credit, of which the International Banking Corporation had notice they ought to have delivered the bills of the Eastern Bank, Limited, in London, and not to Messrs. George Knowles and Company; that the appellants being precluded by this misdelivery from recovering the price of the gunnies from the Eastern Bank, were accordingly discharged from their liability on the bills to the respondent, and, in the alternative, that, if the respondents' liability for this misdelivery sounded in damages only, the amount of such damage was the same as the amounts of the bills, and could be set off so as to extinguish any liability on the bills. No custom of merchants or bankers as to confirmed credits in connexion with documentary bills or otherwise was pleaded, proved, or relied on. At their Lordships' bar the appellants' counsel did not insist on the contention that the mere negotiation of the drafts pursuant to the exchange brokers' contract was in itself an out-and-out purchase of them

by the Banking Corporation without recourse to the drawers in any event and the question whether the remedy was by way of set off or only of counter claim for damages was not debated before them.

The conclusion of the trial Judge that the transaction disclosed nothing to relieve the drawers from their liability was affirmed by the High Court, the learned Judges holding that the question really turned on the documents, and that whatever assumptions might be made in favour of Messrs. Sassoon and Company as regards their transaction with Messrs. Knowles and Company, the description which they gave of the drafts, unaccompanied by any explanation limiting the effect of D/A as a description, entitled the International Banking Corporation to surrender the bills of lading to the acceptors on getting their acceptances, as they did.

The facts are as follows: Messrs. Knowles and Company became known to Messrs. Sassoon and Company as early as September 1922, and, after some correspondence, a contract was concluded between them on the 11th May 1923, for twenty-five bales of gunnies per month to be shipped from July to September. So far as the evidence shows, Messrs. Knowles and Company were then in reasonably good credit nor does it appear that their insolvency was suspected until the time when they dishonoured their first acceptances. They were throughout personally unknown to the International Banking Corporation.

The terms on which Messrs. Knowles and Company from the first proposed to deal and ultimately did deal with Messrs. Sassoon and Company included the following: the price was c. i. f. U. K., and reimbursement was to be by drafts at ninety days' sight against confirmed credit, to be opened in the sellers' favour upon the conclusion of each contract. After the first purchase and sale had been concluded, the Eastern Bank in London wrote to its branch in Calcutta on the 31st May 1923, enclosing copies of letters of agreement with that bank signed by Messrs. George Knowles and Company on the previous day and described as being in favour of Messrs. Sassoon and Company available to be presented at three months sight against full shipping documents.

While this letter was in the post Messrs. Sassoon and Company cabled to Messrs.

Knowles and Company on the 5th June, "Referring to your letters of credit they must be confirmed irrevocably." Thereupon on the 19th June, the Eastern Bank London cabled to its Calcutta branch that the letters of agreement signed by Messrs Knowles and Company of which copies had been forwarded were "now confirmed." The communication itself which had obviously been made by Messrs. Knowles and Company to the Eastern Bank in London between the 5th and 19th June is not in evidence but Messrs. Knowles and Company's letter of agreement addressed to the Eastern Bank in London and dated the 30th May is endorsed by some one in pencil, "Made confirmed credit 15th June 1923." It is sufficient to quote from it following :

We hereby authorize and request you and your agent in Calcutta to give banking facilities and accommodation . . . against and or negotiate on or before 15th October 1923 and any . . . bills . . . not exceeding three months after sight and drawn on us by or endorsed by Messrs. A. Sassoon and Sons Limited and . . . we hereby agree duly to accept any such bill or bills for any sum or sums not exceeding in the aggregate £2,080 and to pay the amounts of such bill or bills at maturity.

The drawers and/or endorsers and/or the holders of such bill or bills will hand over, but merely by way of collateral security, to you bills of lading for merchandise . . . and we agree that, in case you consider it necessary, you shall be at liberty to sell . . . any of the said merchandise . . . and apply the net proceeds . . . towards payment of the said bill or bills . . .

It is further agreed that the granting of the said facilities and accommodation and/or the negotiation of any bill or bills above referred to shall be optional, and that this agreement cannot be either revoked or altered in any way except in writing with the express consent of your bank . . .

Of this document, which appears to have been headed "Agreement from London No. 2 (with recourse)", no copy was sent to Messrs. Sassoon and Company, though a copy was sent to the Eastern Bank's Calcutta Branch. On the 18th June, however, the Calcutta Branch sent to Messrs. Sassoon and Company a letter of advice, of which the following parts are specially material :

We beg to inform you that an advice has reached us from our London office of letter of Agreement No. 237, signed by G. Knowles and Company, Limited, authorising us to negotiate a bill or bills drawn by you on George Knowles and Company . . .

We are informed that bills of lading for merchandise, together with the relative invoices and pollices . . . will be handed to us. Such bills of lading should be presented to us in complete sets, made out 'to order', blank endorsed, and

marked by the shipping company 'freight paid' . . .

We have pleasure in informing you, that we are prepared at our option as usual to make advances against and/or negotiate any bill or bills drawn in compliance with the terms of this letter.

This letter of advice was on a printed form, and after the above words "of this letter," the form proceeded as follows :

It being understood that this is not a confirmed bank credit and you are in no way released from the ordinary liability of drawers.

These last words from "it being" to "of drawers", were deleted, and after the signature of the Eastern Bank of Calcutta there followed two additions, viz. :

Please note that this authority is a confirmed credit.

When offering drafts for negotiation under this authority, it is imperative that this letter be produced to enable the negotiating bank to note payments on the back hereof.

On these documents the following observations arise.

(1) It was apparently part of the appellants' argument that the deletion of the words in the form "you are in no way released from the ordinary liability of drawers" in combination with the added words, "this authority is a confirmed credit," imports that "you are in some way released from that liability." Their Lordships cannot accept this. There is a good deal of authority, now old, about the effect of deleting words in a printed form of mercantile contract, which it is not now necessary to cite, but they take it to be settled, in such a case as this, that the effect is the same as if the deleted words had never formed part of the print at all. The words expressly added of course, remain to be construed.

(2) The letter of agreement, signed by Messrs. Knowles and Company, contains only the authority given and the promise made by that firm to the Eastern Bank, Limited. So far as the record goes it is not shown how Messrs. Knowles and Company and the bank arranged that the bills of lading should reach the latter in case the drafts were discounted elsewhere, nor is any actual agreement disclosed by which Messrs. Knowles and Company undertook to accept drafts presented by other parties, though no bills of lading were tendered. The general effect of the bank's undertaking and liability may be easily surmised, but their precise terms must have been a matter of express arrangement between

these two parties, and the actual undertakings of the Eastern Bank in London, which almost certainly was in writing, was not disclosed.

(3) What the Calcutta Branch of the Eastern Bank conveyed to Messrs. Sassoon and Company in their letters of advice, which was all the information that the latter had about the terms of the agreement between Messrs. Knowles and Company and the Eastern Bank in London, was confined, except for the second addition above set out, to transactions, in which Messrs. Sassoon and Company would send drafts, with documents attached, to the Eastern Bank in Calcutta for discount, and would then hand over to the bank drafts and shipping documents against payment or credit of the relative sum in rupees. Thenceforward the discounting bank would hold both drafts and bills of lading and, in accordance with Messrs. Knowles and Company's letter of agreement, could look after itself.

(4) It is contended that in spite of the words "when offering drafts for negotiation under this authority," which authorize negotiations to the Eastern Bank alone, the succeeding words "to enable the negotiating bank," convey that the authority advised in the letter of advice extends to transactions with other negotiating banks, and should not be construed as merely meaning "to enable us when we negotiate the drafts. . . ." Even if this be so (and it is a very summary way of converting the terms of a discount offer by one bank into an undertaking applicable to actual discounts by any other bank), it does not follow that, if a third party bank negotiates, all the undertakings and all the dealings referred to in this letter of advice will be or can be made applicable forthwith to such a substituted transaction.

If the drafts had been offered for discount to the Eastern Bank in Calcutta, or if, by arrangement between Messrs. Knowles and Company and the Eastern Bank, the drafts of Messrs. Sassoon and Company had been drawn on the latter *Chartered Bank of India v. Macfayden* (1); *Scott v. Barclays* (2), the transaction would have been one of a normal type

which has often been explained and illustrated in the decided cases, and it would have completely met all the mercantile necessities which such a transaction has been devised to meet *Guaranty Trust v. Hannay* (3), except the possibility that the rate of exchange might have moved against Messrs. Sassoon and Company between the 11th May and the 9th August. The negotiation of the drafts with the International Banking Corporation under the circumstances above detailed is, so far as reported cases go, a novelty. It is here that the difficulty of this case begins. In the case of *Chandanmall Bengeney v. National Bank of India, Limited* (4) some of the drafts mentioned were dealt with in the same way and under similar circumstances, but nothing in the decision throws any light on the legal consequences, which this peculiarity may involve.

According to the evidence on both sides, however, there was nothing extraordinary, still less irregular, in offering drafts, fortified with the letter of advice of the Eastern Bank's confirmed credit, to be discounted by another bank such as the International Banking Corporation. Mr. Young, an official of the Eastern Bank, London, said that the postscript to the letter of advice meant that the negotiating bank might be the Eastern Bank or any other bank, and in this he was not apparently speaking merely of his own view of the wording of the postscript but of banking practice generally, for the plaintiffs' manager, Mr. Thompson, said frankly that although the letter of advice "asked for the documents to go to the Eastern Bank, Limited, Calcutta," it was "quite customary for other banks to negotiate drafts under credits belonging to other banks," and, in fact, "likelier than otherwise." He said, further, that there was no particular difficulty about his sending the drafts and documents to the Eastern Bank for presentation to Messrs. George Knowles and Company, and that with different shippers he would have done so but in this case he thought that the credit arrangement had been superseded by Messrs. Sassoon and Company, that

(1) [1895] 64 L. J. Q. B. 367=72 L. T. 428=43 W. R. 397=15 R. 333.

(2) [1923] 2 K. B. 1.

(3) [1918] 2 K. B. 623 at p. 660=87 L. J. K. B. (1223)=119 L. T. 321=23 Com. Cas. 399=34 T. L. R. 427.

(4) A. I. R. 1924 Cal. 552=51 Cal. 43.

for some reason they were deviating from the credit by sending in the bills for discount D/A, that they wanted to allow (sic) these as documents against acceptance, and that he was willing on the strength of their names to discount the drafts on those terms, viz., D/A. Under the terms of the letter of advice, he would have handed the documents to the Eastern Bank and not to Messrs. Knowles and Company, but he thought this credit arrangement had been superseded.

Of this evidence the appellants' counsel have made much, as they were fully entitled to do, and their Lordships think it right to consider the main question in the case on the footing of these answers, as both the Courts in Calcutta appear to have done. They accordingly put aside certain contentions advanced by the respondents as follows. Neither the letter of agreement nor the letter of advice nor any document, which relates to them, makes them in terms "irrevocable," the term "confirmed" alone being used, yet both words were stipulated for by Messrs. Sassoon and Company on the 5th June 1923. According to Mr. Thompson the appearance of both words on the credit document is an indispensable formality. It is not easy to see in what respect either word or both of them together would carry the matter further than the word "contract," used in its strict sense, would have done, for apparently a confirmed credit is something formerly provisional, and now turned into something definite by way of promise, and the word "irrevocable" simply closes the door on any option or *locus poenitentiae*, and makes the agreement definite and binding—in other words, creates a true contract, which will either be performed or be broken. The trial, however, proceeded on the footing that the credit given in favour of Messrs. Sassoon and Company and referred to in the letter of advice, was in all essentials what Messrs. Sassoon and Company had bargained for, and at their Lordships' bar it was too late to argue the contrary. So, too, without actually holding that the words added to the letter of advice, which refer to "the negotiating bank," mean that the credit and the advice are in law available to the full to any bank other than the Eastern Bank of Calcutta, which may discount

the drafts mentioned therein, their Lordships will discuss the present case on the footing of the view taken by Mr. Thompson himself, that such was their meaning to the minds of business men.

As the present case is one of first impression, two general observations may be useful. So long as trade is proceeding in its ordinary course without violent fluctuations in prices, and so long as all parties concerned are in good credit, banks, whose business it is to facilitate trade, can and no doubt by voluntary arrangements among themselves smooth out small difficulties and ignore informalities, when no serious consequences are likely to result. When, however, a Court of law is for the first time called upon to fix legal liability, by declaring what the intentions of the parties must be taken to have been, it becomes necessary to consider how an unruffled and unquestioned business would work out, if difficulties were to arise such as would at each step bring out the risks to be run and the responsibilities to be borne by one or other of the respective parties. Suppose a fall in the price of gunnies, which made it important for the buyers to avail themselves of any legal ground open to them for refusing to take up the goods or to meet the bills; suppose a financial crisis, which for the time being seriously involved the reputation of the bank which had granted the confirmed credit; in either case suppose a discounting house, ignorant, as here, alike of the exact terms of the purchase contract and of the agreement for the confirmed credit; how is the discounting house to know whether it can safely give up the bills of lading to the London bank on the one hand or whether, on the other, it can reckon on acceptance of the drafts only when it has the bills of lading available to be handed to the drawee against acceptance? It is to be remembered that, common as it is for the grant of the credit to be made on the terms that the grantors are to be secured by possession of the bills of lading, other forms of security are sometimes used, the choice of the form depending on the relations between the two parties concerned and the solvency of the importing firm (see, for example, the terms of the credit in *The Kronprinsessan v. Margareta* (5) and in *Prehn v. Royal*.

Bank of Liverpool (6). The legal rule must be one which will fit and make sense of the transaction equally under fair-weather conditions and under foul.

Take again the practical side of the matter. There are many business situations where an offer is made, in which it is hardly possible to ask questions or to go behind the documentary materials put forward by the proposer. Underwriting a slip is one; discounting a trade draft is another. Mr. Thompson, from the documents before him, had to judge whether he would approve or disapprove, whether he would risk taking the documents or risk letting the business go past him. To ask questions, even if there had been anyone at hand to answer, might have betrayed either ignorance of his own business or a desire to know too much about his customers. The exchange memorandum told him quite plainly that the drafts were D / A, which meant "documents against acceptance." Here was an instruction as to the use he was to make of Messrs. Sassoon and Company's documents of title. True, it did not say who was to present the documents to the acceptor, but it was evident that, if the letter of advice was right in saying that the Eastern Bank was to have and keep the bills of lading, the documents could not be handed by the respondents to Messrs. Knowles and Company against acceptance at all. As discounters, their first duty, both to Messrs. Sassoon and Company and to themselves, was so to present the drafts for acceptance, as either to get them accepted or to get them dishonoured for lack of acceptance. In their Lordships' view, the respondent bank was entitled and bound to follow this instruction. In face of it, there could be no question of such a misdealing with the drawers' rights by way of security as would afford any answer to their action.

Two answers have been attempted in argument. The first is that the drafts were tendered as D / A drafts only to comply with the terms of Messrs. Apcar's exchange contract, which fixed a standard rate for D / A drafts and options for drafts on other terms, varying from the standard by fixed fractions. It is said that all Messrs. Sassoon and Com-

pany wanted was to get the rupee exchanged at 1s. 4-3/16d. There is, however, some confusion in this. Messrs. Sassoon and Company wished to get this rate of exchange, and had to claim it under their contract by presenting drafts of such a description as that rate attached to, but the drafts were still described as D / A drafts, and, whatever the object which was immediately in view, D / A drafts they actually were. That these letters meant "documents against acceptance" was common ground, and accordingly some clear reason has to be shown for saying that, in the circumstances of this case, they nevertheless meant documents against the Eastern Bank's acceptance, which, in fact, they had not undertaken to give, or documents to the Eastern Bank against Messrs. Knowles and Company's acceptance of the draft, if they should be willing to give it without receiving the documents. Mr. Moise Sassoon actually answered the question: "Can you explain why D / A was put in the memo.?" by saying: "Because the documents were deliverable to, and for acceptance of, the Eastern Bank." This was an impossible construction. Equally so is the contention that D / A is a direction merely as to the time when the shipping documents are to be surrendered and not as to the person who is to receive them. Evidence as to the meaning of D / A as a term of art might possibly have gone as far as this, but, as the case stands, D / A, on this view would be an incomplete and ambiguous direction and the party directed cannot be blamed if it was reasonably interpreted and acted on (*Ireland v. Livingston* (7)). In any case, it assumes that the discounting bank is to interfere radically with what is *prima facie* the right of the accepting consignee on what may be a mere surmise. The drafts were for acceptance of Messrs. Knowles and Company, and if the documents, that is, the shipping documents, were deliverable to the Eastern Bank, then, as far as the International Banking Corporation was concerned, these acceptors would not get any documents in exchange for their acceptance. It hardly appears that on either side there had been much consideration of the rights and obligations arising out of this

(6) [1870] 5 Ex. 92=21 L. T. 830=39 L. J. Ex. 41=18 W. R. 463.

(7) [1873] 5 H. L. 395=27 L. T. 79=41 L. J. Q. B. 201.

use of the letter of advice as applicable to a negotiation with the International Banking Corporation.

Accordingly, a second and much more ingenious answer was given to their Lordships. On the faith of the confirmed credit, for which they had stipulated, Messrs. Sassoon and Company proceeded to put the shipment in train to come into the hands of those who might be interested in it in London. This was done by placing the documents in the hands of the International Banking Corporation in Calcutta, with notice that the transaction was backed by a confirmed credit. After this the credit could not be revoked by the Eastern Bank. Merely to hand to a banker a draft styled D / A and a corresponding letter of credit must be deemed in law to tell him that the bills of lading are to be handed to the issuer of the letter of credit and not to the acceptor of the draft, and his remedy is to decline to discount, however approved the bill may be as a bill, if he does not like those terms. It is true that Messrs. Sassoon and Company did not bring the terms of the credit to the Corporation's notice, nor did they know them themselves; but this does not matter. They put the Corporation in the position of being able to sue the Eastern Bank in London on the credit in accordance with the principle of *In re Agra and Masterman's Bank* (8), and on inquiry it would be ascertained, as business experience would have led the Corporation to anticipate, that the condition precedent to the Eastern Bank's obligation to give effect to the credit was the delivery of the bills of lading to them. All was really plain sailing. If only the bills of lading were given up to the Eastern Bank, somehow or other the drafts would be met either by Messrs. Knowles and Company, if they accepted and paid without getting the consignment or the documents which represented it, or by the Eastern Bank, if they did not. The delivery of the bills of lading to the Eastern Bank in London, it was said, became matter of contract between the appellants and the respondents, as the result of the discounting transaction, so that the latter's recourse against the former was suspended and became ineffectual unless and until the

Eastern Bank made default. In effect, the respondent bank was provisionally substituted for Messrs. Sassoon & Company as sureties for the bills, though this substituted suretyship would itself be defeasible in case of any wrongful failure to pay on the part of the Eastern Bank.

This argument was properly and indeed indispensably reinforced by the principles, which apply when a surety has secured his secondary liability by placing in the principal creditors' hands security which belongs to himself in the first instance. Here Messrs. Sassoon and Company, having shipped the gunnies under such a form of bill of lading as reserved the *jus disponendi* to themselves until the documents were delivered with their authority to the buyers for the purpose of passing the property placed these instruments, representing the goods while afloat, in the Banking Corporation's hands, as collateral security giving them a special property in the goods, but remaining available generally for the protection of the sureties to whom they belonged. They also placed within the reach and control of the principal creditors another and still more important security, the commercial pivot of the whole transaction, namely, the confirmed credit of the Eastern Bank, and to this precisely the same rules applied as to the bills of lading. If the Banking Corporation entered into the transaction with notice of the existence of a confirmed credit of an ordinary banking character without knowing its exact terms, that was their own affair. They took the risk of its being such that they could comply with them. If for any reason they failed so to deal with the bills of lading as to secure to the drawers' recourse to the confirmed credit, then, *pro tanto*, the drawers would be discharged. Between *Agra and Masterman's Bank* (8) on the one hand and *Polak v. Everett* (9) on the other, the discounting bank would be quite able to look after themselves.

Their Lordships are unable to give effect to these contentions. The principle of the decision cited is one applicable between the discounting bank and the bank which, having established the credit in favour of the acceptor, gives

(8) [1876] 2 Ch. 391=12 E.L. 500.

(9) [1876] 1 Q. B. D. 669=35 L. T. 350=46 L. J. Q. B. 218=24 W. R. 689.

notice *urbi et orbi* of its willingness to abide by the operation of the credit through the machinery of drafts discounted before acceptance. If the respondents discounted the drafts on the faith of the invitation (if any) contained in the letter of advice, *In re Agra and Masterman's* case (8) entitled them, if they chose to do so, to sue on the credit agreed by the Eastern Bank with Messrs. Knowles and Company as if they had been parties to it from the beginning. If they had not discounted on the faith of that invitation, the principle would not apply, and Mr. Thompson said clearly in effect, what Messrs. Sassoon and Company can neither complain of nor deny, that for him the name of Sassoon and Company was good enough in this case, and the confirmed credit was accordingly superfluous. Apart from this, however, the principle would only confer a right of action on the International Banking Corporation against the Eastern Bank, if they chose to exercise it, but it would not impose on them a duty towards Messrs. Sassoon and Company, so as to modify the ordinary right of recourse at all events or in any event. It is a matter between the respondent Corporation and the Eastern Bank, not between Messrs. Sassoon and Company and the respondent Corporation.

On the other hand, they think that the letters D/A are a complete answer to the part of the argument, which rests on the obligation of the principal creditor not to waste the surety's security. If the creditor complies with the surety's instructions, there can be no further responsibility. The whole gist of the complaint, as far as the confirmed credit is concerned, is that by not handing the bills of lading to the Eastern Bank the respondents failed to satisfy the conditions precedent to their liability and so nullified the confirmed credit. The appellants' description of the drafts as D/A drafts destroys the validity of this complaint. Messrs. Sassoon and Company instructed the respondents to surrender the documents to the acceptors against their acceptance, and this was done. Again, if the obligation of the principal creditor not to deal unreasonably or imprudently with the securities is relied on, the result is the same. All the information given to the

respondents by the drawers of the drafts, who after all, had made their own bargain with the acceptors, pointed to the quite normal intention of giving the buyer of the gunnies control of the goods on the faith of his acceptance to the drafts. This was *prima facie* the intention, in fact, so far as the information given indicated. If the confirmed credit modified this, it was not for the discounting bank to make guesses or to run risks, but for the drawers to say what their wishes were. Their Lordships cannot say that the conduct of the International Banking Corporation was unreasonable under the circumstances.

No doubt, as soon as Messrs. Sassoon and Company had got a rupee credit for their sterling drafts at 1s. 4-3/16d., they thought as a matter of business that they had done with the transaction, and it may be disappointing to merchant shippers to find that it nevertheless remained at their risk. It may be also true that, when the Calcutta banks fell into a course of business, which may be called a good-natured convenience to merchants or a far-sighted development of legitimate business exactly as you please, it would have been better to have intimated to the trade, that the banks were not undertaking all the burdens of shippers' transactions, however they might turn out, but this is not the present issue. How proof of a custom of bankers and merchants, applicable to these particular facts, would have affected the decision is a matter on which it is not permissible to speculate. It may also be that the case was not as completely presented at the trial as merchants generally might have desired, but with this their Lordships cannot deal. The appellants are not in a position to show that, when they discounted these drafts, they bargained that the transaction should be without recourse, and in order to qualify their direction, given by the letters D/A, and to limit the respondents' *prima facie* right of recourse against themselves, they must show some contract with them to that effect, or some breach of contract or of duty on their part, which would have that effect in law. No authority has been produced which enables them to do so, and their Lordships cannot say that any legal principle

leads to that conclusion. They will accordingly humbly advise His Majesty that this appeal should be dismissed with costs.

D.D. *Appeal dismissed.*

Solicitors for Appellants—*T. L. Wilson & Co.*

Solicitors for Respondents—*Sanderson, Lee & Co.*

*** A. I. R. 1927 Privy Council 204**

(From Allahabad)

15th July 1927

LORDS SINHA AND BLANESBURGH, AND
SIR JOHN WALLIS AND
SIR LANCELOT SANDERSON.

Saiyid Mehdi Ali Khan—Appellant.

v.

Chaudhri Ghanshiam Singh—Respondent.

Privy Council Appeals Nos. 18 and 19 of 1926 : Allahabad Appeals Nos. 23 and 24 of 1923.

* *Civil P. C., O. 23, R. 3—Hindu Law—Father can compromise suit in respect of adopted son's share in joint family property—Hindu Law.*

A Hindu father has full authority to act on behalf of his adopted son and to enter into a compromise in a suit on mortgage of joint family property in respect of his interest in the property. [P 205 C 2]

L. DeGruyther, W. Wallach and T. C. K. Kurup—for Appellant.

A. M. Dunne and K. V. L. Narasimham—for Respondent.

Lord Blanesburgh.—The short question upon this appeal was whether the learned Judges of the High Court of Judicature at Allahabad were justified in ordering, as they did on the 28th May 1923, that a written compromise of all questions in the suit, as between the appellant and the two respondents, should be filed and proceeded with. In making this order the High Court differed from the Subordinate Judge at Muzaffarnagar, who, on the 1st February 1922, had refused to pass such a decree.

Many questions were canvassed in the Courts in India. The issue, however, as presented to the Board, had become a narrow one. The facts on which it depends lie in a small compass.

The respondent Chaudhri Ghanshiam Singh is a Hindu of position. Amongst

the properties with which he had apparently dealt as his own were two villages: mauza Duddhli and mauza Barsu. These he had purported to mortgage with possession to the appellant Saiyid Mehdi Ali Khan. He had also granted a mortgage over mauza Barsu to one Lala Ghokal Chand. It is not necessary for present purposes to detail the mortgages over other property granted by Ghanshiam to other creditors and particularized in the plaint in this suit. It suffices to say that, as a result of his borrowing transactions, Ghanshiam had, in the early part of 1920, become so gravely embarrassed that in May of that year the appellant instituted against him in the Court of the Subordinate Judge of Meerut a suit to enforce his security over the two villages named. What defences were or would have been raised therein by Ghanshiam their Lordships do not know, because further progress apparently ceased as the result of the institution of this suit by the respondent Kunwar Bharat Singh in the circumstances now to be stated.

Kunwar Bharat Singh claims to be the adopted son of Ghanshiam, and, as member of the joint Hindu family so constituted, to be joint with his adoptive father in, inter alia, the two villages above referred to. In that character he applied in Saiyid Mehdi Ali's suit for leave to intervene, alleging that the mortgages of family properties made by Ghanshiam were not made for legal necessity and were not binding upon him. His position as adopted son of Ghanshiam was at once challenged by Saiyid Mehdi Ali as well as by Ghanshiam's other mortgage creditors, and in the result his application for leave to intervene in the suit was refused, and he was informed that his rights must be asserted in separate proceedings.

Thus it was that the present suit was commenced by Bharat Singh on the 20th August 1920, and since its institution no more has apparently been heard of the appellant's earlier suit. This is not surprising when the wide scope of the present suit is regarded. To it all the mortgagees to whom Ghanshiam had purported to grant security and, in particular, Saiyid Mehdi Ali Khan and Gokal Chand, are made defendants. Ghanshiam also is joined as a defendant. By his plaint the plaintiff, Kunwar Bharat

Singh seeks a declaration as to his adoption by Ghanshiam, and he claims that none of the mortgages of family property made by Ghanshiam were made for legal necessity and that they are none of them binding on the family. On the 23rd December 1920 a written statement by the present appellant Saiyid Mehdi Ali was delivered, in which the allegations of the plaintiff are challenged seriatim, and the appellant sets up that there is due to him in respect of his mortgage upon mauza Barsu a sum of Rs. 1,00,250, of which full particulars are given in the pleading. It is clear to their Lordships on a perusal of this written statement, that it was the purpose, and the laudable purpose, of the appellant to have determined in the present proceedings all questions as to his mortgage claims whether as against Bharat Singh or as against Ghanshiam Singh, and it is these questions which are the subject of the compromise now in question.

That compromise was brought about by the good offices of Mr. Marsh, the Collector of Muzaffarnagar, and is embodied in a memorandum dated the 2nd November 1921, signed by the appellant and Ghanshiam, as well as by Mr. Marsh and two other gentlemen friends of the parties who had also intervened to bring about the settlement. The memorandum is fully set forth in the judgment of the High Court, and their Lordships do not consider it necessary to have it again printed. Although it is not signed by Bharat Singh, their Lordships, like the High Court, are satisfied that it was made by Ghanshiam Singh as well on Bharat Singh's behalf as on his own, and with his full authority. In all other respects the terms of the compromise are quite clear. The appellant in effect, is to have from both father and son a clean conveyance of 15 biswas of mauza Barsu in full satisfaction of all his mortgage claims: he is also to pay Rs. 5,000 for part satisfaction of Lala Gokal Chand's mortgage on the same mauza, which is to be so far extinguished that the 15 biswas to be transferred to the appellant may be transferred free of that charge.

It would appear that shortly after he had entered into this compromise the appellant repented of it and refused to be bound by its terms. His objections to it before the learned Subordinate Judge were partly technical, partly sub-

stantial. The plaintiff Bharat Singh was no party to it: it did not relate to the suit: it was fraudulent: it had not been performed by Ghanshiam. The learned Subordinate Judge was of opinion that no fraud was established and that the breach was that of the appellant and not that of Ghanshiam: but he held that the compromise could not be recorded under O. 23, R. 3, because, in his view, the son was no party to it and had only subsequently elected to be bound by it because it was to his advantage so to be.

From this refusal the present respondents appealed to the High Court. The learned Judges of that Court, not being satisfied that the allegation of fraud made by the appellant had, on full materials, been disposed of by the learned Subordinate Judge, referred that issue again to him, and after a further full hearing, and, as the Judges of the High Court say, for overwhelming reasons, that learned Judge found again that there was no false or fraudulent representation whatever. For the rest, the learned Judges of the High Court were of opinion that the father had full authority to act on behalf of the son, and that throughout the son was bound by the terms of the compromise. They accordingly directed the compromise to be filed and they prescribed the terms upon which the transaction was to be completed. From that order the present appeal was brought by Saiyid Mehdi Ali Khan.

Before their Lordships the question mainly argued was that the compromise was not a complete and final settlement of the suit so far as the appellant was concerned: that its terms were not of a character of which specific performance could be granted, and, less strongly, that it was not, *ab initio*, binding upon the son, the respondent Kunwar Bharat.

Their Lordships have been unable to accept any of these contentions. They are in full accord with the learned Judges of the High Court as to the authority of Ghanshiam to bind Kunwar Bharat to the compromise in respect of his interest in the property, and in their judgment the terms agreed to are such as to be susceptible in every detail to an effective order in the nature of specific performance against any party to the compromise who seeks to escape from his

obligations thereunder. In their Lordships' judgment the terms agreed to entirely dispose of the suit so far as the appellant's interests therein are concerned.

To the details of the order of the High Court no separate objection was raised by the appellant. In these circumstances their Lordships, as they have already informed the parties, are of opinion that the order of the High Court cannot be disturbed, and they think for the reasons which they have now given, that this appeal from that order should be dismissed, and they will humbly advise His Majesty accordingly. The appellant must pay the costs of the appeal.

D.D. *Appeal dismissed.*

Solicitors for Appellant. — *Douglas Grant and Dold.*

Solicitors for Respondent. — *H. S. L. Polak.*

A. I. R. 1927 Privy Council 206

(From Madras: A. I. R. 1922 Mad. 263.)

28th June 1927

VISCOUNT DUNEDIN, LORDS SHAW AND SINHA, AND SIR LANCELOT SANDERSON.

Raja Rajeswara Setupati—Appellant.

v.

Muthanan Servai—Respondent.

Privy Council Appeal No. 31 of 1926.

Lease—Construction.

Plaintiff, zamindar, leased out his village to the defendants, and the lease deed provided: "Whereas cowle has been given to you for 30 faslis from fasli 1803 last with a poruppu of Rs. 420-10-10 per fasli according to peshkash rate, in respect of Vahaikudi village . . . which is of the extent of nanja seed land kalams 187-3-0 and punja kurukkams 3 whose average per fasli for the aggregate ten faslis from fasli 1289 to fasli 1298 works at Rs. 972-3-2, you shall enjoy the same together with mavadai maravadai thittuthidal, etc., in the said village and duly pay said poruppu amount of Rs. 420-10-10, each fasli Along with the said poruppu amount you shall pay the amounts for road cess, jari mahamai, dharma mahamai, etc., to be fixed bearing on the aforesaid accounts."

[P 206, C 2; P 207, C 1]

The state of affairs at 1894 was that the grain on the estates was all brought to the granary. It was then divided. The cultivating tenants got 52 per cent. of the grain. Of the balance, 9 per cent. was appropriated to pay the village

officers and 3 per cent. was appropriated for various charities. Remaining 36 per cent. the zamindar kept for his own use. In 1911, the Government relieved the zemindars from the charge of paying the village officers, but raised the peshkash, obviously on the assumption that the zamindar benefited by the relief. Plaintiff sued the defendants for: (1) the rent; (2) the amount payable for the charities; and (3) the amount which, prior to 1911, had been handed over to the village officers. The defendant admitted that they took the 9 per cent. grain, but pleaded that it was their own under the terms of the lease. [P 207, C 1].

Held: on construction of the lease that the 9 per cent. was not conveyed to the lessee, that the de facto handing over of the grain by him was really done ad hoc as an agent for the zamindar, and therefore the claim of the lessee to have a proprietary right in the 9 per cent. under a personal obligation to pay the village officers was quite unfounded in the circumstances. The village officers, if they were not paid, had a claim against the zamindar, and against him alone, no privity of contract being created between the lessee and those officers. [P 207, C 2; P 208, C 1]

L. DeGruyther and *K. V. L. Narasimham*—for Appellant.

A. M. Dunne and *P. V. Subba Rao*—for Respondent.

Viscount Dunedin.—These are two suits which were brought by the Raja of Ramnad, as plaintiff against the cowledar, who held a lease of certain villages, as defendant. The two suits relate to two different villages. The date of the leases is 1894, and, there being no practical difference between them, it will be sufficient to quote one lease.

The lease, which is termed a cowle-nama, was executed on the 10th December 1894, and was in these terms:

Whereas cowle has been given to you for 30 faslis from fasli 1303 last with a poruppu of Rs. 420-10-10 per fasli according to peshkash rate, in respect of Vahaikudi village, situate within the four boundaries mentioned below and attached to Kottakudi division, Rajasingamangalam taluk, which is of the extent of nanja seed land kalams 187-3-0 and punja kurukkams 3-0-0 whose average per fasli for the aggregate ten faslis from fasli 1289 to fasli 1298 works at Rs. 972-3-2, you shall enjoy the same together with mavadai maravadai thittuthidal, etc., in the said village and duly pay the said poruppu amount of Rs. 420-10-10, each fasli, . . . commencing from fasli 1303 last according to kistbund instalments whether you make cultivation or let the lands or run waste and whether there be or be not any yield. In default, you shall make payment with interest at 1 per cent. per mensem from the date of default. You shall conduct repairs to the tanks, etc., in the said village. You shall be rendering accounts showing particulars of collections in respect of cultivation made in the village every fasli. Along with the said poruppu amount you shall

pay the amounts for road cess, jari mahamai, dharma mahamai, etc., to be fixed bearing on the aforesaid accounts. In default of payment of the said poruppu amount, etc., you shall be liable to the following: viz. your being proceeded against under Act 8 of 1865, the said village being liable to the said amount falling due, your having no concern in the avarampattai, etc., lease and proceedings being taken according to law in case of default in any part hereof. Yourself and your heirs are bound to cause to be rendered every year the services to the Devasthanam temples and the palace which have to be rendered during the Navaratri and Sankaranthi and for dragging the car, as also to pay uluppai, etc., and you shall deliver possession of the village to the estate in the beginning of fasli 1333 when the cowle expires. To this effect is the cowlenama executed. An income of about Rs. 100 is derivable from the said village in respect of dharma mahamai, jari mahamai, road-cess, etc.

Then the particulars and the boundaries are set out.

In order to consider the import of this lease, it is necessary first to consider what was the state of affairs at 1894. It has been proved that the state of affairs was this. The grain on the estates was all brought to the granary. It was then divided. The cultivating tenants got 52 per cent. of the grain. That left 48 per cent. undisposed of. Of this, 9 per cent. was appropriated to pay the village officers and 3 per cent. was appropriated for various charities. This left 36 per cent. which the Raja kept for his own use. In 1911 the Government relieved the zemindars from the charge of paying the village officers. The defendants in these two cases fell into arrears and plaints were then started which asked for decrees for: (1) the rent; (2) the amount payable for the charities; and (3) the amount which, prior to 1911, had been handed over to the village officers. A decree was granted for (1) and (2), and there is no question now raised as to that. As to (3), that is to say the amount which was handed over to the village officers, it is admitted that the defendants de facto took the grain, but they pleaded that it was their own under the terms of the lease. The Subordinate Judge gave judgment in favour of the plaintiff for all three sums. On appeal the two Judges differed and therefore the judgment stood. Second appeals were taken under Letters Patent. Two of the three Judges before whom the appeals were heard held that the grain belonged to the defendant under

his lease, and they therefore confirmed the decrees of the Subordinate Judge as to (1) and (2), but allowed the appeal as to (3).

Appeal from that judgment is taken to His Majesty in Council. The sole question therefore is: Was there a right to the 9 per cent. of the grain given to the defendant under the lease. After the relief of the zemindar by the Act of 1894 the Government raised the peshkash payable by the zemindar by the following notice:

As the villages in the Ramnad zemindari are being grouped, and fixed monthly salaries paid to the holders of the three village officers, headman, karnam and talaiyari or kavalgar, under S. 6 of Act 2 of 1894, and as these village officers are not in future entitled to swatantrams or ivu manyams which they have been hitherto getting and which were deducted from the total boriz of the zemindari when the peshkash was fixed, the Government of Madras have resolved to raise the peshkash of the Ramnad zamin by Rs. 13,105 under S. 27 (2) of Madras Act 2 of 1894. You are therefore required to show cause in person or in writing, on or before the 19th March next, why the said sum divided rateably between the various portions of the zemindari should not be adopted and the same collected from you in addition to the present peshkash you pay.

This was obviously only done on the assumption that the zemindar was the person who benefited by the relief afforded.

Now the lease is silent as to the 9 per cent. due to the village officers. The learned Judges, who decided in favour of the defendant, came to the conclusion that, as the lease bore to be of the village, it must be inferred that the 9 per cent. was transferred to the respondent, imposing on him an obligation to pay the village officers. They therefore thought that the case was analogous to cases quoted where, a conveyance having been made of lands under certain burdens, if from any extraneous cause the burdens disappear, the benefit accrues to the grantee of the lands and not to the grantor.

Their Lordships do not read the lease in this sense. No mention being made expressly of the payments to the officers, the transaction must be looked at as a whole to see what was meant to be done. Now, first, it is certain that the officers, if they were not paid, had a claim against the zemindar, and against him alone. They could not have sued the cowledar because there was neither privity of contract nor relation of tenure on which

such a suit could have been based. It is therefore antecedently improbable that the zemindar would part with a specific fund which he had to pay to the officers to a third party, taking as his security the personal obligation of the third party to pay the officers. Further, it is admitted that the calculation of the average takings from the tenants put at Rs. 972 odd in the one lease, and Rs. 982 in the other, was calculated on the 36 per cent. only of the total receipts of grain; and, as the tenant was getting the lease for Rs. 420 odd, and also getting waste lands which were unlet to tenants, and had only to pay about Rs. 100 in the one case, and Rs. 120 in the other, for cesses, &c., he was getting a very ample margin of profit.

Then as to the clause with regard to the payment of the charity dues, which are admitted to be 3 per cent.: this, it will be noticed, is not put as part of the rent, but as a separate payment. It was natural that the zemindar should wish the charity fund handed over to him, because he was the dispenser of the charities, a function for which the cowledar would have been totally unfitted. The fact that special words as to the payment of this are put in, makes it all the more significant that the question of the 9 per cent. was left undealt with.

Their Lordships therefore come to the conclusion that the 9 per cent. was not conveyed to the cowledar, that the de facto handing over of the grain by him was really done ad hoc as an agent for the zemindar, and therefore the claim of the cowledar, to have a proprietary right in the 9 per cent. under a personal obligation to pay the village officers, is quite unfounded in the circumstances.

In this view it becomes quite unnecessary to discuss whether, if the view had been opposite, the zemindar would have been entitled to a sort of conditional equitable compensation by getting his rent increased under the provisions of the Madras Act 2 of 1894.

Their Lordships will therefore humbly advise His Majesty to allow the appeals in both actions and to restore the judgment of the Subordinate Judge with the costs in the Courts in India. Under the Order in Council, granting the appellant special leave to appeal, he will pay the respondent's costs of the appeals to His

Majesty in Council as between solicitor and client.

G.B.

Appeals allowed.

Solicitors for Appellant — *Chapman Walker & Shephard.*

Solicitors for Respondent — *H. S. L. Polak.*

A. I. R. 1927 Privy Council 208

(From Patna : A. I. R. 1926 Patna 112.)

4th July 1927

VISCOUNT DUNEDIN AND LORDS SHAW
AND SINHA.

Abdul Wahab Khan—Appellant.

v.

Tilakdhari Lal and others—Respondents.

Privy Council Appeal No. 45 of 1926 :
Patna Appeal No. 19 of 1925.

Co-sharers—Partition.

An estate which had originally formed part of a larger estate belonged to three persons. These three persons separated in board and residence and separate accounts were opened for each of their shares in the estate. The estate, however, was not partitioned under the Estates Partition Act. Some of the lands were thenceforth in the separate and exclusive possession of each of the three co-sharers, who separately collected the rents from the tenants of those lands; in respect of some others they collected the rents, each according to his share, and some waste or uncultivated lands were held jointly. However, there was no deed or writing indicating a formal partition. The plots of land in the exclusive possession of the proprietors were described in rent receipts and zemindari papers as *kamat*.

Other facts were that the rents for definite and specific plots of land have been paid exclusively to the several proprietors for a long period without dispute and without any subsequent adjustment or distribution; that when some of these plots were compulsorily acquired under the Land Acquisition Act, the compensation moneys were separately paid and appropriated by the separate proprietors who had been previously collecting the rents in respect of those lands; and when a record-of-rights was prepared of these villages and finally published, the plots were recorded as being the separate property of their respective landlords, without any dispute or controversy on the part of the others. Further, on the map prepared, the plots lay, not in three compact blocks but in many cases isolated and scattered.

Held: that there was a partition between the different holders of the estate.

[P 209 C 1, P 210 C 1,2]

L. DeGruyther and *B. Dube*—for Appellant.

G. R. Lowndes and *E. B. Raikes*—for Respondents.

Lord Sinha.—This is an appeal from a decree of the High Court of Judicature at Patna, dated the 6th March 1925, reversing a decree of the Subordinate Judge of Monghyr, dated the 28th April 1921.

The decree dismissed a suit brought by the plaintiff, Tilakdhari Lal (now respondent), against the defendant, Abdul Wahab Khan, and others, for partition of an estate comprising the villages of Tetulia, Hardia, Belhanda and Dhamhare, and bearing tauzi No. 4920 on the rent roll of the Collector of Monghyr. The High Court decreed partition.

That estate had originally formed part of a larger estate named Tappa Chautham and received its separate tauzi No. 4920 when carved out of the parent estate more than forty years ago. At that time its proprietors were Hansraj Singh, Bhukhan Singh and Totaram Singh, who formed a joint Hindu family.

These three persons separated in board and residence in or about 1876, and either then or afterwards separate accounts were opened for each of their shares in the estate tauzi No. 4920, under Act 11 of 1859. The estate, however, was not partitioned under the Estates Partition Act, but the principal defendant (Abdul Wahab Khan) alleged that there was an amicable partition between the parties of the lands comprised in the said villages whereby: (1) some of the lands were thenceforth in the separate and exclusive possession of each of the three co-sharers who separately collected the rents from the tenants of those lands; (2) in respect of some others they collected the rents each according to his share, and (3) some waste or uncultivated lands held jointly.

On the 15th May 1888 Ram Kishun Singh, the son of Hansraj Singh (then deceased), sold to one Nawab Khan a three-annas share in the estate out of his one-third share of 5 annas 14 gundas 6 dants, and thereafter Nawab Khan had a separate account opened in the Collectorate in respect of his purchase.

Plaintiff, Tilakdhari Lal, for himself and his deceased brother, also purchased by a series of sale deeds from different co-sharers in tauzi No. 4920, shares which in the aggregate amounted to 7 annas 2 cowries 5½ dants, and in respect of which also a separate account in the Collectorate was opened.

He thereafter applied to the Collector for a partition of the estate No. 4920 under the Estates Partition Act, but that application was opposed by Nawab Khan, and the revenue authorities finally rejected it on the 3rd April 1919.

The plaintiff filed this suit for a partition of all the lands comprised in the said four villages by the civil Court on the 14th January 1920, against all the proprietors of estate No. 4920. Such partition would leave the estate an entire unit *quo ad* the revenue authorities, but would nevertheless be binding as between the co-shares themselves.

The principal contending defendant was Nawab Khan's son and representative (now appellant), whose estate is under the Court of Wards; and on his behalf the suit was resisted on the ground that all the lands, with the exception of a small quantity of waste or uncultivable lands, had been partitioned amicably between the parties twice before, once as between the three original proprietors, when each branch divided the lands (with the exception above named) into three several shares, and once again as between himself and his vendor.

It is the first partition which is important, as the second depends on the first. The material issues on the pleadings were:

(1) Whether the suit is barred by limitation.

(2) Whether there has been a private partition.

The Subordinate Judge found in favour of the defendant on both issues, and, inasmuch as the suit was for the partition of the whole of the lands, and not merely of the undivided waste, dismissed the plaintiff's suit.

On appeal to the High Court this decision was reversed on the ground that the alleged partitions were not proved and there had been no such adverse possession as could create a separate title in favour of the defendant.

Their Lordships have, therefore, found it necessary to consider the whole of the evidence, both oral and documentary.

It is an undisputed fact that more than forty years ago, when the family separated in food and residence, some arrangement was come to between Hansraj Singh and his brothers, whereby possession of by far the larger portion of the lands was distributed between them

With regard to some, it was arranged that the rents should be collected separately according to their respective shares; with regard to others, that they should be in the exclusive possession of each co-proprietor. The plaintiff alleges that this was merely for convenience of management. The defendant asserts that it was in pursuance of a formal partition.

The learned Chief Justice of the Patna High Court was of opinion that the present state of affairs may quite possibly be explained on either hypothesis, but he considered that certain facts pointed strongly to the absence of any formal partition having taken place, in particular the absence of any deed, document or writing in connexion with such partition.

That, no doubt, is an important fact to bear in mind. It has also been urged before this Board that the plots of land, which are in the exclusive possession of the proprietors, are described in rent receipts and zamindari papers as *kamat*, which tends to show that they may have been taken without any formal division. But, on the other hand, there are other undisputed facts, which point so strongly in the opposite direction that their Lordships have come to the conclusion that such oral evidence as there is in support of a formal partition was rightly accepted as correct by the Subordinate Judge.

These facts are:

(1) That the rents for definite and specific plots of land have been paid exclusively to the several proprietors for so long a period without dispute, and without any subsequent adjustment or distribution.

(2) That there has been not only this appropriation of rents for separate plots; but, when some of these were compulsorily acquired for a railway in 1903 under the Land Acquisition Act, the compensation moneys were separately paid and appropriated by the separate proprietors who had been previously collecting the rents in respect of those lands.

(3) When a record-of-rights was prepared of these villages under the Bengal Tenancy Act, and finally published in 1903, the plots referred to in (1) and (2) were recorded as being the separate property of their respective landlords,

without any dispute or controversy on the part of the others.

(4) The very appearance of these separated holdings, i. e., the plots from which rents are collected exclusively, on the map prepared for the purposes of this case, which lie, not in three compact blocks, but in many cases isolated and scattered, seems to negative the theory that the arrangement for exclusive collection of rent was for convenience of management.

For these reasons their Lordships will humbly advise His Majesty that the judgment of the High Court should be set aside and the judgment of the first Court restored, with costs in both Courts, and the costs of this appeal. This will be without prejudice to the right of the plaintiff to sue for partition of the lands which are admittedly still undivided.

Solicitors for Respondent—*H. S. L. Polak*.

Solicitors for Respondent—*Watkins & Hunter*.

G.B.

Appeal allowed.

* * A. I. R. 1927 Privy Council 210

(From Bombay)

28th June 1927

VISCOUNT SUMNER, AND LORDS
SHAW AND DARLING.

Kaikhushroo Rustomji Wallace — Appellant.

v.

The Bombay Company, Ltd. — Respondents.

Privy Council Appeal No. 57 of 1926.

* * *Evidence Act, S. 31—Account books though recording merely result of transactions are assumed to contain principles on which the distribution of results takes place—Contract—Construction.*

A firm's books come into existence and are kept not for the purposes of a mere statistical record of transactions and payments or of prices and rates. They are essentially a statement in figures of the firm's business as a whole, so shaped as to bring out the precise results of all transactions in rights and obligations and in profits and losses and the principles, on which they set off one set of figures against another and attribute and distribute the results, are as much part of the books as the figures themselves, though no written statement of them is anywhere set out. [P 213 C 1].

Where defendant agreed with plaintiff: "You will receive a sum equivalent to 5 per cent. of

the net profits (as shown in the books) of the Bombay branch of the Bombay Company Limited as accruing from the sales of all goods for which you were salesman, whether on purchase or joint account," [P 211 C 1]

Held: a plaintiff, who accepts the defendants' books as deciding his rights to some extent, accepts them to that extent (unless he guards himself by apt words) as statements of the right mode of distributing the results of the recorded transactions, and not as a mere repository of figures like a calendar or price list. On the terms of this agreement the books cannot be divorced from the system of book-keeping of which they are the expression. The thing on which the percentage is to be reckoned is the profit of the branch as shown, and in showing a profit the mode of getting at it is as relevant as the final figure. The profit is the profit of the Bombay branch, not of some selected department of that branch, and it is the company's profit. Profits "shown" can only mean profits, which from time to time are or in the ordinary course of business will be, shown. [P 213 C 1,2]

W. N. Greene and S. O. H. Collins—for Appellant.

G. R. Lowndes and E. B. Raikes—for Respondents.

Viscount Sumner.—This action was brought by the appellant, Mr. Wallace, to recover a balance of commission, alleged to be due to him under an agreement dated the 7th February 1920, between himself and the respondents, his former employers. Ultimately the question is one of construction, and the words which are chiefly material are these:

1918-1919 Accounts.—You will receive a sum equivalent to 5 per cent. of the net profits (as shown in the books) of the Bombay Branch of the Bombay Company, Limited, as accruing from the sales of all goods for which you were salesman, whether on purchase or joint account.

In addition to this . . . you will be credited with a further sum equivalent to 5 per cent. of the net profits as shown in the books of the Bombay branch . . . as having accrued from the sale of all goods sold on joint account and for which you were salesman during the years 1916-1917, 1917-1918, and 1918-1919.

1919-1920 Accounts.—As regards other goods sold by you prior to the 7th February 1920, the results of which have not been included in our closed accounts up to 31st July 1919, you will be given remuneration on the same basis detailed above. The total sum due to you will be paid as soon as the net profit is ascertained, and you will be asked to give us a final receipt in full settlement of all claims whatever against us.

The circumstances under which the agreement was entered into are these: After twenty-six years in their service as a salesman, Mr. Wallace desired to end his connexion with the respondents, certain fresh terms, which he suggested, not proving acceptable. All that remained was to agree the method and

ascertain the figures, according to which his outstanding commissions should be paid to him. Their course of business was this: They purchased piecegoods in England at prices reckoned in pounds sterling and sold them through their salesman to dealers in or near Bombay at prices which were reckoned in pounds sterling also. Long credit was given to these buyers and accordingly the respondents often lay out of their money for a considerable time. To pay for the goods in England and for other purposes they remitted funds generally to their English correspondents, who paid the English sellers for the goods, and they made these remittances from time to time as was convenient, by means of sterling drafts on England procured in Bombay at the current rate of exchange. It was not necessary that specific remittances should be made for specific parcels of goods or that the date of the remittance and the due date of the invoices for the goods should coincide, and they found it sufficient to treat payments in their own books as having been made at the average rate of exchange for the customary period within which they fell.

The respondents are also what is called a rupee company. Their financial arrangements are computed in Indian currency, and in particular their profit and loss accounts and balance sheets are made upon a rupee basis. Owing to the length of time intervening between payment for the goods imported and receipt of the sale proceeds from the Indian buyers, they had to show their financial results for office purposes and for presentation to their shareholders during this interval by converting the apparent sterling proceeds into Indian currency at a rate of exchange which was, in the first instance, provisional. An average rate was again made use of, not necessarily over a period corresponding to that used for converting remittances to Europe, nor even always a uniform period. For their own purposes this closed the transactions, and the rupee profit so appearing was treated as realized and final, subject only to reduction in the event of bad debts. These seem to have been of rare occurrence before 1919, but such as there were could be dealt with in the subsequent accounts as occasion might require. So long as the rate of exchange remained fairly

stable, questions as to the best method of calculating it did not arise.

It is not contended that the respondents' books have not been carefully and correctly kept or that any change in their system has been adopted for the purpose of the accounts, which they submitted in the action. Down to the date of the dispute Mr. Wallace accepted and still accepts payments, which were made, in fact, according to the method which they still employ. This does not prejudice him, for it may not previously have been worth his while to raise any question, nor was he shown to have actually known how the books were kept, but the fact is worth recording as it removes any appearance of inconsistency or arbitrariness, which might otherwise arise on the respondents' contentions.

As a purely academic matter the question is one of comparing two figures. Mr. Wallace's commission depends on the Bombay Company's profit. That profit is nett, which, as the parties agree, means that in ascertaining the profit the result of the transaction must be looked to, but that the expenses of the business in connexion with it need not. *Prima facie*, in respect of each sale effected by the salesman, the sum received for the goods sold, less the sum paid for them, is the profit, and these sums have to be compared in the same currency.

Mr. Wallace, however, conceded further that this pure theory must be modified in practice. He himself is paid in rupees, and here, at any rate, exchange enters into the transaction. He accepts the respondents' method of ascertaining the rate of exchange, at which the original cost is converted into rupees, namely by an average rate, but with the method, by which the company shows its internal financial position, or the figures, on which it invites its shareholders to approve its profit and loss account, he contends that he has nothing to do. He was a servant, not a shareholder. His concern was only with the ultimate realized profit. Again, with the operations of the respondents' exchange department he contends that he has no concern, for exchange should be regarded as a wholly separate business. He was only a piecegoods salesman, an employee who earned a commission, not a co-adventurer with the respondents, interested in the outcome of the sales as

such. Hence a bad debt affects him only so far as it prevents the ultimate realization of a profit. No profit, no commission, was his bargain, but he had no agreement as to sharing losses in any form.

The validity of these objections, of course, depends on the extent, to which the theoretic position of a commission salesman is in this case qualified by the agreement sued on, according to its true construction. Two preliminary observations may be permissible: firstly, the object of the agreement is to put an end to existing business disputes by a short and even summary manner of deciding them; secondly the mode in which this end is to be attained is by making the business books of one party conclusive evidence against the other for certain purposes, instead of being evidence against the Bombay Company and then only if the appellant should find it worth his while to put them in.

The present dispute relates only to the commission due for the period beginning on the 1st August 1919, which was the commencement of the respondents' financial year, and ending with the 7th February 1920, the date of the agreement. In 1916 and 1917 exchange was practically steady. It then began to rise, and in two years had risen from 1s. 4-9/32d. at the 1st August, 1917, to 1s. 8-1/32d. at the 1st August 1916. By February and March 1920, it was as high as 2s. 7d.; by July it had fallen to 1s. 10d., and in 1921 it was as low as 1s. 3-13/32d. Such fluctuations inevitably produced difficult conditions for dealers, both importers and local merchants. One result, which can hardly have been unforeseen by experienced people in the trade in February 1920, was that local buyers became slower in settling their accounts, and in many instances ultimately defaulted. Another was that, in the meantime, the method of converting sterling into rupee obligations or vice versa might prove very important to persons, whose rights and liabilities were still unsettled. How, then, does the agreement of February 1920, deal with these matters?

As the amount of Mr. Wallace's commission is a matter of percentage, the real point is the profits, on which that percentage is to be taken. According to the words of the agreement these profits are: (1) profits of the

Bombay Branch, (2) accruing from sales by Mr. Wallace, (3) as shown in the respondents' books, (4) nett. "The books" accordingly become to some extent the arbiters of his rights. What are "the books"? A firm's books come into existence and are kept not for the purposes of a mere statistical record of transactions and payments or of prices and rates. They are essentially a statement in figures of the firm's business as a whole, so shaped as to bring out the precise results of all transactions in rights and obligations and in profits and losses, and the principles, on which they set off one set of figures against another and attribute and distribute the results, are as much part of the books as the figures themselves, though no written statement of them is anywhere set out. A plaintiff, who accepts the defendants' books as deciding his rights to some extent, accepts them to that extent (unless he guards himself by apt words) as statements of the right mode of distributing the results of the recorded transactions, and not as a mere repository of figures like a calendar or a price list. The main object of the bookkeeping was to determine and show the trading position and results of the company, though a minor and incidental object served was to show what it owed Mr. Wallace for commission. That matter always lagged behind the conclusion of his sales, and in 1920 was likely to be more behindhand than ever. Having left the respondent's employment, he might presumably have even less opportunity than before of ascertaining for himself how these transactions were working out, but as these results would be shown in the books, as and when the buyers met their obligations, from these entries his percentage could, and in ordinary course would, be transferred to the credit of his account in the ledger. Their Lordships do not think that on the terms of this agreement the books can be divorced from the system of bookkeeping of which they are the expression, or that nothing is intended to be decisive except figures picked out here and there from particular folios. The thing on which the percentage is to be reckoned is the profit of the branch as shown, and in showing a profit the mode of getting at it is as relevant as the final figure. The profit is the profit

of the Bombay branch, not of some selected department of that branch, and it is the company's profit. Unless some agreement with their salesman ties the respondents' hands, the calculation of it is in the first instance their affair.

Mr. Wallace's ledger account in the books showed nothing with regard to the period in dispute, for it had not been posted up, and it was argued that he could not be bound by what the books showed, where they showed nothing, but in such a case only by a calculation from the figures shown, made in accordance with a method which the Court would fix as correct. Their Lordships cannot adopt this distinction. The circumstance that the appellant's ledger account had not been made up cannot alter the rights of the parties. It might have been due to accident. It was, in fact, due to the disputes which had arisen between the parties and everything was carried to a suspense account only. To lay stress on the word "shown" as meaning "now shown" or "shown, when the respondents' servants have been told to show them," is to defeat the efficacy of the contract. The one reading would deprive Mr. Wallace of commission on any sales, on which at the date of the agreement no profit had yet accrued, for the object of the agreement was to settle all transactions for the period in question and not merely such of them as had then got into the books in a completed form. The other would enable the respondent to bring his claim to a standstill by ordering the proper entries to be omitted. Profits "shown" can only mean profits, which from time to time are, or in the ordinary course of business will be, shown. Anything else defeats the contract as an agreement of compromise, and, on the other hand, the agreement refers to profits "shown as accruing" in the books, not to profits which the books do not and never will show as accruing, though by a combination of selected book entries and of argument upon them they may be represented as profits, which ought to have been shown as accruing.

In the view which their Lordships have thus taken of the meaning of the agreement, they can now proceed to deal with the appellant's three objections to

the accounts as shown in the respondents' books.

(1) When customers who have "fixed the exchange" with the exchange department subsequently default, the respondents, in exercise of their right to reduce apparent profits to net profits, deduct from the amount credited on sales account the amount of rupees, into which the sterling debt had been subsequently converted when the exchange was "fixed," instead of the corresponding amount of rupees at the date of that credit.

(2) When the customers have met their obligations and have paid for the goods purchased, all that the respondents enter in ascertaining their net profits is the sterling selling price converted into rupees at the average exchange over a period anterior to the actual date of payment. Thus, when the exchange has been "fixed" after the end of the period over which the rate of exchange was averaged, the respondents have, in fact, received more rupees than the amount of rupees, which they bring in as the basis of their profit, and on which the appellant's commission is reckoned. When this higher number of rupees has been paid, the respondents say nothing about it; when it is a bad debt they bring it in as a deduction in full, and Mr. Wallace is disadvantaged both ways.

(3) In addition to their separate importations of piecegoods, the respondents have an arrangement with a Manchester firm, under which they import piecegoods on joint account. The Indian customers being known to them, but not to the Manchester firm, they have agreed with that firm, in return for a half per cent. commission, to guarantee the payment for the goods. Thus, when they render account sales, they credit themselves with this commission and with one-half of the profit appearing on the sale contracts, and so the matter is closed. All bad debts are thereafter solely their own affair. When they come to reckon their net profits, they charge the account with all bad debts, but with only half the realized profits plus their *del credere* commission, and account to Mr. Wallace for his commission on the balance. His objection is that as against him only half of the bad debts should be charged. Though he

negotiated the sales, he was not informed of the *del credere* arrangement, and, as he does not receive any percentage on the Manchester firm's share of the profits, he should not suffer an abatement of his percentage on the respondents' share in consequence of it.

To this there is an answer, which is separate from the general answer applicable to all three objections. It was the view of both Courts below, with which their Lordships agree, that the half per cent. *del credere* arrangement was a part of the joint account arrangement and ought not to be treated at the will of Mr. Wallace as a separate trading transaction. It was the very natural price asked for the respondents' admission to the joint account business at all. In the result their net profits on the whole transaction were a moiety of the profit appearing on the selling contracts, plus a half per cent, and minus all bad debts, if any. It is on this basis that they have accounted so far as the joint account business is specially concerned.

The general answer is the same for all three objections. The system adopted by the respondents is the system by which the appellant has agreed to be bound. In the abstract Mr. Wallace's contention is this. He sells in sterling goods bought in sterling, and, subject to realization, the profit is a sterling profit measured by the difference between the buying cost and the selling price, and the commission is a sterling percentage payable when that profit is realized. Rupee exchange has nothing to do with the transaction. The employers can take payment in any currency and at any rate they like; the only material question is whether the customer has performed his contract. The employers have to pay his commission in sterling, however inconvenient he may find it. As for bad debts, so far as he is concerned, they are simply sales negotiated, but resulting in no commission-bearing profit. They have, therefore, to be eliminated from the list of his transactions. He has lost his labour, but he has nothing to do with his employer's loss of the price of their goods, nor can this be used to diminish profits successfully earned on other transactions, so as to deprive him of his percentage thereupon. In the

abstract Mr. Wallace's contention may be right.

The difference between the abstract position and that which, in the concrete, Mr. Wallace accepts for the purposes of this appeal serves to emphasize the fact that his actual employment was necessarily relative to his employers' way of doing business and had to conform to it. If he had insisted on abstract terms, he would probably not have been employed at all. As it is, he admits a conversion into rupees, so as to get payment in rupees; he admits an aggregation of the sale transactions of the year with the consequent averaging of the rate of exchange at which the sterling cost is converted into rupees, and he admits the consequent interpretation of the word "nett" as authorizing a deduction of bad debts in their entirety. He argues that the operations of the exchange department concern him, when the buyers perform their bargains, and entitle him to his percentage on the enhanced rupee receipt as "fixed" on a falling rupee exchange, while they do not concern him at all when the buyers' default involves the deduction of bad debts from the profits assumed for the purposes of the company's own finances. All this merely shows how essentially his rights depended, and depend, on express bargain; on his written agreement so long as he was at work; on the agreement sued on when he came to compromise a dispute, which would have involved a challenge of the basis, on which the company regulated the whole of its affairs. The witnesses did not contest that the company's system was reasonable and sound for its own purposes, and an agreement to be bound by the books of the business naturally did not provide a special and different system for the relatively small part of it, which affected Mr. Wallace.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

D.D.

Appeal dismissed.

Solicitors for Appellant—*Field, Roscoe & Co.*

Solicitors for Respondents—*Johnson Jecks & Collough.*

A. I. R. 1927 Privy Council 215

(From Lahore)

11th November 1926

VISCOUNT HALDANE, AND LORDS
SUMNER AND SINHA

Mukund Singh and others—Accused—
Petitioners.

v.

King-Emperor—Respondent.

Petition from High Court Criminal
Appeal No. 411 of 1926.

Criminal P. C., S. 231—First charge under S. 120 B and 109—Other charges for specific offences in pursuance of criminal conspiracy including more than three murders within one year—Trial, was held to be legal by the High Court—P. C. Simply dismissed petition for special leave.

The petitioners were tried and convicted upon eight charges. The first charge was one under S. 120 B and S. 109 of the Penal Code, of a criminal conspiracy to commit murder and other offences. The other charges consisted of other specific offences as committed by various members of the conspiracy in pursuance of the conspiracy on various occasions. One of the charges was in respect of seven murders committed within one year. The petitioners were convicted under S. 302 and sentenced to death. In appeal to the High Court their conviction and sentences were confirmed. They applied for special leave to appeal to His Majesty in Council and it was contended that there was misjoinder of charges under S. 234 of the Criminal P. C. the Privy Council dismissed the application without giving reasons.

De Gruyther and Wallach—for Petitioners.

Dunne and Kenworthy Brown—for the Crown.

Facts.—On the 28th February the petitioners were convicted by the Additional Sessions Judge, Lahore, of offences punishable under S. 302 read with S. 120 I. P. C. and were sentenced to death. These convictions and sentences were confirmed on appeal by the High Court of Judicature at Lahore on the 25th June 1926.

The case for the prosecution was that in the Punjab there had been a conspiracy known as the Babbar Akali conspiracy; that the objects of the conspiracy were to terrorize such persons as were loyal and supporters of Government so that they might refrain from giving information to Government about the movements and activities of the conspirators. If such persons paid no heed to the warnings given them, their ears and noses were to be cut off

and if this measure failed they should be "reformed" or in other words murdered; and that in pursuance of the conspiracy, murders, decoity and other crimes were committed including the murders on the night between the 10th and 11th April 1924, with reference to which the petitioners had been convicted.

The petitioners and 23 other accused were tried jointly by the learned Additional Sessions Judge on the eight charges shortly stated as :

(1) That they between January 1922 and September 1924 at.....and various other places jointly and severally agreed and engaged with one another and with some or all of the persons named and described and others to do or to cause to be done certain illegal acts, to wit;

(i) import and possess arms and ammunition, and to go about armed;

(ii) commit and attempt to commit murder;

(iii) cause grievous hurt; and

(iv) commit robbery and dacoity;

which are offences punishable under S. 19 and 20 of the Indian Arms Act (11 of 1878), and Ss. 302, 307, 326, 392, 394, 395, 396, 397 and 398 I. P. C. with, death, transportation or rigorous imprisonment for a term of two years or more and thereby committed an offence punishable under S. 120-B and 109 I. P. C.

(2) That they in conspiracy with some or all of the persons named in the Schedule during the above-mentioned period, at the places aforesaid, in pursuance of the afore-mentioned conspiracy did :

(i) go about armed without a license in contravention of the provisions of S. 13 Indian Arms Act;

(ii) had in their possession or control fire-arms, ammunition or military stores in contravention of the provisions of S. 14 Indian Arms Act, and in such a manner as to indicate an intention that such act may not be known to any public servant and thereby committed offences punishable under S. 19 and 20 Indian Arms Act (11 of 1878) read with S. 120-B, 109, 114, 115 and 116 I. P. C.

(3) That they, in conspiracy with some or all of the persons named and in pursuance of the aforesaid criminal conspiracy committed murders and among others caused the death of 7 persons between March 1923 and April 1924,

and thereby committed offences punishable under S. 320 read with Ss. 120-B, 109, 114, 115 and 116 I. P. C.

(4) That they, in conspiracy with some or all of the persons named, in pursuance of the aforesaid Criminal Conspiracy inter alia, did certain acts with such intent or knowledge and in such circumstances that if by those acts they had caused the death of the specified persons between the night of 15th and 16th July 1923 and 10th and 11th April 1924, committed offences punishable under S. 307 read with Ss. 120-B, 109, 114, 115 and 116, I. P. C.

(Charges 5 to 8 specified various offences viz. those of grievous hurt, robbery and dacoity.)

In support of the case for the prosecution, the prosecution relied on the evidence of an approver and the retracted confessions of each of the petitioners. The learned Judges of the High Court stated that the conviction of each of the petitioners was based on the evidence of the approver which as to the actual commission of the murders was corroborated by the confessions of the accused which had however been withdrawn. That with reference to the confessions it was submitted in the Courts in India that they were false and not voluntary and that they were not recorded in accordance with the provisions of S. 164, Criminal P. C., inasmuch as the explanation which the Magistrate must give under Cl. 3 of S. 164 before recording the confessions had not been given and because the Magistrate had not complied with the section in stating in his memorandum at the foot of the confession that he had explained to the accused that he was not bound to make a confession and that if he did so, any confession that he might make might be used as evidence against him and that he believed that the confessions were made voluntarily.

In order to cure the non-compliance with the provisions of S. 164, Criminal P. C., the Magistrate himself was called as a witness under S. 533 of the Code in order to state that before recording each confession he had given the necessary warning to each accused and that in each instance he was satisfied that the confession was made voluntarily.

It was also submitted on behalf of the petitioners that the trial was bad owing to the fact that there had been a misjoinder of charges.

The learned Judges of the High Court held that charges 2 to 8 merely recited the various incidents or offences committed from time to time by various members of the conspiracy in pursuance of the conspiracy and that there was no illegality in the joint trial and they confirmed the convictions and sentences. The petitioners applied for special leave to appeal to His Majesty in Council. It was contended that the joint trials of the petitioners on 8 different charges which amongst others included 7 charges of murder, 2 charges of attempted murder, 4 charges of robbery, 2 charges of causing grievous hurt, and 11 charges of dacoity, spread over a period of more than twelve months was contrary to the provisions of the Criminal P. C. dealing with joinder of charges, and to the decision of their Lordships of the Judicial Committee of the Privy Council (*Subramania Iyer v. King-Emperor* (1)) and that the non-compliance of the learned Sessions Judge with the provisions of the Criminal P. C. dealing with the joinder of charges was a violation of the fundamental principles of natural justice and the procedure adopted by the Courts in India vitiated the trial.

Viscount Dunedin merely said that the petition must be dismissed.

D.D. *Petition dismissed.*

Solicitors for Petitioners—*T. L. Wilson & Co.*

Solicitors for Respondent—*Solicitor, India office.*

(1) [1902] 25 M.L. 61=28 I. A. 237=10 M. L. J. 117=3 S.R. 160 (P. C.).

* * A. I. R. 1927 Privy Council 217

(From Bombay: *A. I. R. 1922 Bom. 18*).

28th June 1927.

LORDS ATKINSON, CARSON, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Laxmanrao Madhavrao Jahagirdar—Appellant.

v.

Shriniwas Lingo Nadgir and others—Respondents.

Privy Council Appeal No. 149 of 1924,
1927 K/28 & 29

(a) *Bombay Revenue Jurisdiction Act* (10 of 1876), S. 4—S. 4 precludes a Court from entertaining a claim to cancel watan register.

The words of S. 4 are wide enough to preclude the Courts from entertaining any claim to the watan offices in opposition to the claim of the hereditary officers recognized or appointed under the Act, and also any claim for the cancellation of the watan register. [P 223, C 1]

* * (b) *Limitation Act*, Art. 14—*Enforcement of a: Illegal order gives a fresh start: A. I. R. 1922 Bom. 18 Reversed.*

If the order is illegal, the plaintiff is not bound to file a suit to set it aside, but is entitled to wait until it is enforced against him, and the attempt to enforce it against him gives him a good cause of action. [P 223, C 2]

(c) *Bombay Revenue Jurisdiction Act* 10 of 1876), S. 4—*A suit for refund of contribution under Act 3 of 1874 is barred unless exempted by Act 11 of 1852—Bombay Hereditary offices Act (3 of 1874)—Bombay Titles to Rent-free Estates Act (11 of 1852).*

Land revenue in S. 3 is defined as including "any cess or rate authorized by Government under the provision of any law for the time being then in force," and the suit for a refund of the contribution levied under Act 3 of 1871 would, therefore, be barred unless exemption is claimed by virtue of an adjudication under Act 11 of 1852, which declares the particular property to be exempt. [P 223, C 2]

G. R. Lowndes and M. R. Jardine—for Appellant.

A. M. Dunne and E. B. Raikes—for Respondents.

Sir John Wallis.—This is an appeal from a judgment and decree of the High Court of Bombay reversing the decree of the District Judge of Dharwar and dismissing the suit brought by the plaintiff Laxmanrao, Jahagirdar of Hebli, for declarations: (1) that the plaintiff and defendants 12 and 13 are, and that the nadgirs are not, watandar patils and kulkarnis of Hebli village; (2) that the lands measuring 120 mars entered in the watan register of the village prepared under Bombay Act 3 of 1874 are not watan lands; (3) for a cancellation of the register; (4) for declaration that these lands were not liable for the remuneration of patils and kulkarnis; and (5) for the recovery of Rs. 969-0-8 levied from the plaintiff under Bombay Act 3 of 1874.

The plaintiff alleged that the grant to their ancestors in 1748 of the village included 200 mars of land assigned for the remuneration of the patil kulkarni and nadgir offices in the village, and also the offices themselves, that as the defendants' ancestors who were the previous owners of these watans had failed to pay the judi and raised a rebellion,

their watans had been resumed long before 1723, and so the watani nature of the lands came to an end; that ever since the establishment of the British Government the plaintiff's family had been in possession of all the said 200 mars, except $7\frac{1}{4}$ mars and 3 bighas and except 22 mars of which they had been deprived in a civil suit filed by defendants 7 to 11 in 1867, and also had been in possession of all patilki and kulkarniki rights. They alleged that they were watandars of patilki and kulkarniki under the sanad of 1748. and, if not, were entitled to their offices by virtue of long possession. The proceedings of Government recognizing the family of defendants 2 to 11 as watandars, and framing the watan register accordingly, and imposing a contribution on the plaintiff under Act 3 of 1874, were accordingly wrongful.

In para. 15 it was pleaded that the 200 mars were not now watan land

the reason being that in the year 1858 the Inam Commissioner decided that the whole of the village of Habli, including the land measuring 200 mars, is not watan, but that it is another kind of estate, and on date the 6th March 1863, Government passed final orders to that effect in resolution bearing number 676. Although Jahagirdars and Nalgir (meaning the family of defendants 2 to 11) were (the only) parties to that matter (i. e. inquiry) still the Government, Jahagirdars and Nadgirs are bound by this decision and the decision passed by the Settlement Officer in the year 1864 that only $7\frac{1}{4}$ mars and 3 bighas of land is liable to settlement.

The cause of action, it was alleged, arose on the 7th October 1908, when Government passed resolution 10129 deciding that the nadgirs were watandars depriving the plaintiff and defendants 12 and 13 of their rights, and making the lands in possession of the plaintiff's family liable for the remuneration of the patil and kulkarni although they were not watani lands.

The first defendant, the Secretary of State in Council, filed a separate written statement pleading that the suit was barred by Bombay Act 10 of 1876, S. 4 (a), Bombay Act 3 of 1874, S. 25, and Arts. 14, 120 and 124, Limitation Act. He also pleaded that the family of defendants 2 to 11 were the real watan patils, kulkarnis and nadgirs, and that the 200 mars of land were kadim inam, of which 120 were assigned for patilki and kulkarniki, and the rest for the nadgir office. They had been in the

possession of the jahagirdars, under kamavishi or temporary arrangement, because the watandars were unable to pay judi, and not because the jahagirdars were patils, kulkarnis or nadgirs. The jahagirdars had admitted this and were estopped from questioning it. Further the orders passed by Government were legal and proper. The allegations in para. 15 of the plaint were not admitted, and the plaintiff was put to strict proof of them.

As regards the Nadgirs, defendants 2 to 11, the principal written statement was filed by defendant 4. Defendants 2 and 3 and 5 to 11 filed written statements to the same effect, defendants 5 to 11 contending further that the suit was bad for misjoinder of defendants 5, 6 and 7. Defendant 12 was ex parte and defendant 13 filed a written statement supporting the plaintiff.

The contentions of the parties sufficiently appear from the principal issues settled in the case, which were as follows :

(1) Is the jurisdiction of the civil Court barred by S. 4A, Bombay Act 10 of 1876 ?

(2) Is it barred by S. 25, Bombay Act 3 of 1874 ?

(3) Is it barred by the Pensions Act 23 of 1871 ?

(4) Is it in time ?

(10) Are the decisions of the Inam Commissioner and settlement officer under Act 11 of 1852, binding on the parties ?

(13) Is the land in suit (120 mars) watan property ?

(14) Have plaintiff and defendants 12 and 13 acquired by adverse possession a title to the offices of watandar patil and kulkarni, and to the watan land ?

The District Judge found for the plaintiff on all the issues except that he held that the claim for the cancellation of the watan register was barred under S. 4 (a), Bombay Revenue Jurisdiction Act, 1876. The High Court allowed the appeal and dismissed the suit on grounds which will be considered later.

The history of this litigation is long and complicated, but the facts which are material for the decision of the case may be stated as follows :

In the village of Habli there were in former times the usual service watans, or hereditary offices of patil or headman, kulkarni or accountant, and nadgir, which were vested in the family of defendants 2 to 11, who held the watan lands of 200 mars in the village, subject to the payment of Government of a fixed

judi instead of the full assessment, the revenue thus remitted being remuneration for the discharge of their duties. It would appear further from records of the early part of the eighteenth century that this juli fell into arrears, and that the ruling power entered into possession of the watan lands and treated them as kamavishi, or under management, for the purpose of realizing the arrears. This was apparently the state of things when in 1718, the ruling power granted the village to the plaintiff's predecessor in jaghir. The sanad conferred upon him.

the kasbi of Havur Hobli, together with the hamlet Vatanhal and lands appertaining to zabt (i. e., attached) inams of muccadum and nadgirs and others.

The effect of these words is in dispute, but it may be observed that Mountstuart Elphinstone, in his well-known report on the territories conquered from the Peishwa (1821), includes among the sources of revenue of the former Government (p. 31, 2nd edition), a heading "Wuttum Zibtee—Produce of Lands belonging to zemindars sequestrated by Government," and the reports of his subordinates, on which his report was founded, show the extreme reluctance of the rulers in ancient times to forfeit absolutely watan and mirasi lands for the non-payment of revenue, and that even where the owners deserted their lands and fresh cultivators had been admitted, the descendants of the former owners were not wholly barred of their right to reclaim them until the lapse of 100 years. These facts tend to support the construction placed by the Bombay High Court in a suit which will be referred to on the words of the sanad, which they held did not amount to a fresh grant of the watan to the plaintiff's ancestor after confiscation from the nadgirs, because the word "zabt" was capable of meaning "under attachment." It is, however, unnecessary to pursue this point. The District Judge refused to act on the defendants' evidence tending to show that they were in possession in certain years subsequent to the grant of the sanad to the plaintiff's ancestor; and it appears clearly from the accounts produced for the plaintiff, that, ever since the annexation of the Peishwa's territories and the introduction of British rule, these lands continued in possession of the plaintiff's family, and were entered in the accounts under the heading of kamavishi, or under

management, though the defendants' family made unsuccessful efforts to recover them.

This was the state of things when the inam commission was set up under Act 11 of 1852 for the adjudication of titles to lands claimed to be wholly or partially rent free in the presidency of Bombay.

After reciting that claims against Government in respect of inams and other estates, wholly or partially exempt from payment of land revenue, were excepted from the cognisance of the ordinary civil Courts (which, it may be observed, had sole competence as to titles to the land itself), and it was desirable that the said claims should be tried and determined without further delay, the Act proceeded to set up the inam commission for that purpose. Schedule A of the Act contained rules prescribing the duties of each Commissioner and his assistants, and Schedule B:

Rules for the adjudication of titles to estates claimed as inam or exempt from the payment of land revenue.

Speaking generally, in cases coming under R. 1 to 5, the exemption was to be confirmed and to become final, while R. 6 provided that in other cases the lands were to be resumed. R. 7 then provided for the continuance of holdings for the support of mosques and temples, and R. 8 for the continuance of holdings by official tenure meant to be hereditary. This rule would undoubtedly have included the watan offices of patil and kulkarni but for the fifth proviso which was as follows:

The provisions of this rule are not in any way to apply to emoluments continued for service performed to the State, as the service watans of desais . . . patil kulkarnis . . . whose claims are to be disposed of according to the rules which are or may be established for the regulation of such holdings.

Under this Act the question, whether the jahagirdar's grant was a serva inam—that is to say, a permanent revenue-free grant, or was held on sarinjam tenure—came before the inam Commissioner, who on the 31st July 1858, recorded his decision (Ex. 312) that the claimant's title to hold the villages in serva inam was invalid, but that its enjoyment was not to be interfered with in consequence of this decision. This was in accordance with R. 10, Sch. B of the Act, which provided that the rules were not to be necessarily applicable, among other tenures, to sarinjams, the titles and continuance of

which were to be determined as theretofore under such rules as Government might issue.

With reference to watan inams in the village, Ex. 451, of the 9th February 1863, which is a communication from the Jahagirdar to the Mamlatdar or local revenue officer, shows that Major Etheridge, apparently, as Inam Commissioner, had taken up the general question of the kadim inams in this village, that is to say, of the inams which existed before the grant to the plaintiff's family, and not being included in that grant, were liable to be dealt with under the Act.

Major Etheridge's proceedings on this question are unfortunately not forthcoming, but in Ex. 471 of the 12th November 1864, which was a reply to a reference from the Revenue Commissioner, he states that in 1862 he had settled certain items, on the best evidence available, to be kadim. In their Lordships' opinion, the inference is that in so deciding he was acting as Inam Commissioner, and that the reference related to that decision. In his reply, Ex. 471, he deals with 21 items, all of which he had settled (apparently as Inam Commissioner) to be kadim or old inams. Of these, he found on the fresh evidence which was available that only two items, with which we are not now concerned, one being the gramjoshi's or village astrologer's inam, were kadim, that is in existence prior to the grant to the jahagirdars. He went on to observe, however, that the Jahagirdars had not received items 15, 16 and 17 (the 200 mars to which the suit relates) as bona fide khalsat but as "comavises" (i. e., kamavishi). In explanation of these terms, reference may be made to the following passage in Sir Charles Sargent's judgment in regular appeal 3 of 1876, the suit already referred to, with reference to other items of this watan land which are not now in suit.

Now there can be no dispute about the term 'khalsat,' which means when applied to (2 unalienated) lands 'those of which the revenue remains the property of Government not being made over in jagheer or inam to any other parties. (Wilson's Glossary of Indian Terms.)' When used in regard to a jagheer village, it means land which is absolutely the property of the jagheerdar not being made over in inam to any other parties.

With reference to the term "kama-vishi," the learned Judge observed :

It seems very clear that land entered as kamavishi is land which for some reason or other has come under the management of the Government or its assignee for the purpose of collecting the revenue but which has not been incorporated with the khalsat land, which is the absolute property of the Government or its assignee.

Major Etheridge's reply went on to state that it appeared from certain records of 1796 that the kamavishi management remained as before, and that, as there was nothing to show that it had been subsequently altered, with the exception of $7\frac{1}{4}$ mars and 3 bighas which at some time had reverted to the nadgir (the defendant's family), it might be allowed that the kamavishi management of the remaining $192\frac{1}{2}$ mars 6 bighas had assumed a permanency of tenure which could not justly be interfered with. He accordingly recommended that the nadgirs' land of $7\frac{1}{4}$ mars and 3 bighas, with one other item with which we are not concerned, should alone be made amenable to settlement as held from Government when the order for the settlement of alienated villages should be authorized. The remainder, he considered, should belong to the Heblikars or Jahagirdars.

What was done on this recommendation appears from Ex. 477, an entry in the revenue outward register of the Dharwar talequa for 1864-5 containing a precis of a communication sent to the mamlatdar, or subordinate revenue officer of Dharwar. This recites the recommendation of Major Etheridge that only $7\frac{1}{4}$ mars and 3 bighas should be treated as liable to settlement and that all the remaining lands except those lands should be continued with the Heblikars. The entry goes on :

and His Honour the Revenue Commissioner has approved of this in his letter No. 5035 dated the 30th of the month of December, 1864 A. D. Therefore the order has been sent to you for (Daklala) reference in order to give effect to this and the Heblikars have also been informed.

It was admitted by Government in answer to interrogatories that Major Etheridge's recommendation to which effect was thus given, was approved by Government, and in their Lordships' opinion the inference is that it was approved by them on appeal from Major Etheridge's original decision as Inam Commissioner. Under Sch. A, R. 2, the Governor-in-Council was authorized to modify, reverse or annul the decision of the Inam Commissioner, and under Sch. B, R. 11, to relax the rules in favour of

claimants and to interpret the precise meaning of any of the rules as to which a question might arise. Their Lordships, therefore, see no sufficient reason for differing from the District Judge's finding that the decision that the suit lands, with the exception of the 7 mars, were not to be treated as *kadim*, and so amenable to settlement, must be taken to have been made in the exercise of the powers conferred by the Act, a finding which is not questioned in the reversing judgment of the learned Chief Justice, who proceeded on the view that such a decision having regard to Prov. 5 to R. 8 was without jurisdiction. In their Lordships' opinion, however, it was within the jurisdiction of the Government as the supreme authority under the Act to decide whether these lands should be dealt with in the one way or the other.

Before considering the effects of this decision it is necessary to complete the narrative of the events which led up to the filing of the present suit.

There were partitions in both families, and in 1867 some members of the defendants' family instituted a suit against some of the plaintiff's family, to which the plaintiff was not a party so that the decision is not binding on him as *res judicata*, to establish their right to the patil and kulkarni offices, and in particular to recover certain items of watan lands which were in possession of the members of the plaintiff's family who were defendants in that suit.

The High Court in R. A. 3 of 1876 held that up to a period within 12 years of the institution of the suit the possession of the defendants (the jahagirdars) was not adverse to the plaintiff (the nadgir), and that the latter was entitled to recover the lands in suit on payment of such arrears of *judi* as might be found due on taking an account. It was found that no arrears of *judi* were due and he accordingly recovered possession.

The other nadgirs, represented by defendants 2, 3 and 5 to 11 in the present suit, did not then institute any suit to recover from the family of the present plaintiff and defendants 12 and 13 the watan lands in their possession.

In 1873 the Bombay Hereditary Offices Act 3 of 1874 was enacted to declare and amend the law relating to hereditary offices; and in 1884 the District Deputy

Collector of Dharwar passed an order, Ex. 295, on an application by members of the nadgirs' family, which appears to have been made in 1875, under Part 6 of that Act for the preparation of the patilki and kulkarniki watans of the village of Hebli. He held that neither the plaintiffs' nor the defendants' families had established their claims and that the appointment should be treated as *amani* or stipendiary. This decision was afterwards reversed by the Bombay Government, who directed a fresh enquiry, Ex. 324 of 22nd November 1890.

The Collector in 1893 reported, Ex. 323, that he was not competent to decide whether the nadgirs or the jahagirdars were watandars and referred the parties to a civil suit. Suits were filed on both sides but not prosecuted; and in 1904 the Commissioner, Ex. 321, directed the Collector to submit his opinion as to which of the two families was entitled to the watan (including lands and rights of service). If it should be found that neither side had any valid claim, the Collector was to report what the watan lands were, and whether they should revert to Government, and if they were sufficient to maintain stipendiary village officers.

The Deputy Collector, to whom the matter was referred, was of opinion that the judgment of the High Court, already referred to, conclusively showed that the nadgirs were the watandars, and the Collector of Dharwar prepared the patilki and kulkarniki watan register of the village on this basis, Ex. 316 of 28th November 1906, deciding, pursuant to the provisions of the Act, which members of the nadgirs' family were to be representative watandars. The jahagirdars appealed and the Commissioner of the Southern Division passed orders on the appeal, Ex. 315 of 17th July 1907.

He held that S. 25 of the Act made it imperative for the Collector to determine who were to be representative watandars, and register their names without waiting indefinitely until one or other of the rival claimants to the office of watandars procured a decision of the civil Court, and that the nadgirs were shown to be the watandars as decided by the High Court in the suit already referred to, and that the representative watandars

had been rightly selected from their family.

He consequently upheld the Collector's decision in determining members of the nadgir family to be representative watan-dars. He was further of opinion that the whole of the watan lands should be entered as such in the watan register, 80 marns for the patilki watan and 40 for the kulkarniki as shown in Major Etheridge's letter of 9th January 1865, but that it would not be necessary to recover for the watan from the jahagirdars in possession more than was required for the endowment of the officiators under the Act.

This order was confirmed by Government resolution 10129 of 1908, and in 1913 the sum of Rs. 969-0-8, which it is now sought to recover, was levied under the Act from the appellant for the emoluments payable to the representative watandars. Thereupon the plaintiff filed the present suit.

On the merits the District Judge was of opinion that the decision of the Governor in Council, confirming the recommendation of Major Etheridge, was binding on the parties and entitled the plaintiff to hold the suit lands free of assessment, and that they had ceased to be watan lands and were not liable to contribution for the remuneration of officiators under the Act.

He held further that the plaintiff's family had acquired the offices of watan-dars patils and kulkarnis by adverse possession, but that under S. 4A, Bombay Act 10 of 1876, the Court had no jurisdiction to cancel the register.

Defendant 1, the Secretary of State in Council, did not appeal from the judgment, but both the plaintiff and the other defendants 2 to 7 preferred appeals, and the High Court, as already stated, allowed the defendants' appeals and dismissed the suit. The judgment was delivered by the learned Chief Justice, who, after reviewing the evidence and examining the judgment of the High Court in A. S. 3 of 1876, held that by reason of Prov. 5 to R. 8, Sch. B of the Act excepting service watans from the rules, there was no valid decision under Act 11 of 1852. Their Lordships have already given their reasons for not accepting this ruling. He also came to the conclusion that in the appeal to the High Court in the

previous suit no reliance had been placed on Major Etheridge's decision or its confirmation, but the learned counsel for the appellant have satisfied their Lordships that the Ex. 337 in that case, which was referred to in the High Court's judgment is Ex. 471 in the present case. With regard to it, the learned Judges remarked :

This entry no doubt correctly described the existing state of facts, and it is not clear that the Inam Commissioner arrived at the conclusion that the land was absolutely the property of the jahagirdars. But even if such were his conclusions, the plaintiff is not bound by a decision to which he was not a party, and the object of which was simply to settle the respective rights of the Government and the jahagirdars.

In the present case therefore the learned Chief Justice was mistaken in supposing that no reliance was placed on this document in the previous suit or that the High Court ignored it.

The learned Chief Justice was further of opinion that the District Judge's finding that the plaintiff's family was entitled to the watan offices could not be supported because it was founded on a wrong view as to the effect of Major Etheridge's recommendation and a wrong appreciation of the evidence on which he found that the jahagirdars had acquired a title to the lands and offices by adverse possession.

He also held that the suit was barred under Art. 120, Limitation Act, except as to the claim for a refund of the contribution as it was not brought until more than six years after the Collector's order of the 26th November 1906, and the framing of the watan register.

As the order could no longer be set aside, he also held that the contribution levied under it could not be recovered and accordingly allowed the appeal and dismissed the suit.

The plaintiff then preferred the present appeal to His Majesty in Council. The first defendant, the Secretary of State in Council, who, as already stated, did not appeal from the judgment of the District Judge, has not entered appearance or instructed counsel to support the judgment of the High Court dismissing the suit; nor have any of the other defendants, except defendant 6 and the representatives of defendant 7, now deceased. These are respondents 4, 5A and 5B. Mr. Dunne, who appeared or

their behalf, intimated that they were only concerned to defend their title as watan-dars and oppose the cancellation of the watan register, and that they were not interested in supporting the order imposing a contribution upon the plaintiff, or opposing the recovery of the contribution actually levied.

In these circumstances it will be convenient in the first place to deal with Mr. Dunne's contention on behalf of these respondents that S. 4. Bombay Revenue Jurisdiction Act 10 of 1876, bars not only the claim for the cancellation of the watan register, but the claim for a declaration that the plaintiff and defendants 12 and 13, and not the nadgirs' defendants 2 to 11, are watan-dar patils and kulkarnis of the village. The section is as follows :

4. Subject to the exceptions hereinafter appearing no civil Court shall exercise jurisdiction as to any of the following matters :

(a) claims against Government relating to any property appertaining to the office of any hereditary officer appointed or recognized under Bombay Act 3 of 1874, or any other law for the time being in force, or of any other village officer or servant ; or

claims to perform the duties of any such officer or servant ; or in respect of any injury caused by exclusion from such office or service, or

suits to set aside or avoid any order under the same Act or any other law relating to the same subject for the time being in force passed by Government or any officer duly authorized in that behalf, or

In their Lordships' opinion these words are wide enough to preclude the Courts from entertaining any claim to the watan offices in opposition to the claim of the hereditary officers recognized or appointed under the Act, and also any claim for the cancellation of the watan register. To this extent, therefore, the plaintiff's case must fail.

As regards the other part of the case, as to which their Lordships unfortunately have not had the advantage of hearing arguments on behalf of the respondents, they are unable to agree with the ruling of the learned Chief Justice that the plaintiff is barred by limitation from suing for a return of the contribution levied on him, and for a declaration that the suit lands in his possession are not liable for such a contribution because he failed to file a suit to set aside the order imposing it within the period limited for filing such a suit. In their Lordships' opinion, if the order was

illegal, the plaintiff was not bound to file a suit to set it aside, but was entitled to wait until it was enforced against him, and the attempt to enforce it against him gave him a good cause of action which was admittedly within time.

It has, however, to be considered whether these claims are not barred under S. 4 Bombay Revenue Jurisdiction Act set out above, a question not dealt with by the High Court.

The District Judge was of opinion that they were not, because of the proviso to the section that

If any person claim to hold wholly or partially exempt from payment of land revenue under . . . (k) . . . an adjudication duly passed by a competent officer . . . under Act 11 of 1852 which declares the particular property in dispute to be exempt, such claim shall be cognizable in the civil Courts.

Land revenue in S. 3 is defined as including "any cess or rate authorized by Government under the provision of any law for the time being then in force" and the suit for a refund of the contribution levied under Act 3 of 1874 would, therefore, be barred unless exemption is claimed by virtue of an adjudication under Act 11 of 1852, which declares the particular property to be exempt. According to the view taken by the District Judge from which their Lordships see no reason to differ, there was in this case an adjudication under Act 11 of 1852 securing the revenue of the suit lands to the jahagirdar, and if this be so it has been pointed out by Sir George Lowndes that Act 3 of 1874, under which the contribution was levied, only extends to this village

so far as its provisions may not conflict with the terms on which any such alienated village may have been secured to its proprietor.

In these circumstances their Lordships see no sufficient reason to differ from the District Judge's conclusions that the effect of the decision was to render the suit lands in the hands of the plaintiff and defendants 12 and 13 not liable to contribution under Act 3 of 1874, and to avoid the bar to a suit for its recovery under S. 4 Act 10 of 1876.

Their Lordships do not consider it necessary or desirable for the due disposal of the suit to enter on any other question ; and they will accordingly humbly advise His Majesty that the plaintiff's appeal be allowed and the decree of the High Court set aside, and that the plaintiff be given a decree declaring that the

suit lands in the possession of plaintiff are not liable to contribution under Act 3 of 1874, and ordering a refund of the contribution sued for and that otherwise the suit be dismissed.

As regards the costs, their Lordships think that the senior nadgirs and the Secretary of State should pay the costs of the appellant in the lower Courts and of this appeal, and that the appellant should pay the costs of the junior nadgirs, represented by Mr. Dunne, in the lower Courts and of this appeal. The order will therefore be that respondents 1, 2, 6 and 7 are to pay the appellant's costs in the lower Courts and of this appeal, and that the appellant is to pay the costs of respondents 4, 5A and 5B in the lower Courts and of this appeal.

R.K. *Appeal allowed.*
- Solicitors for Appellant—Hy. S. L. Polak.
Solicitors for Respondents—T. L. Wilson & Co.

* A. I. R. 1927 Privy Council 224
(From Bombay)
18th July 1927

VISCOUNT DUNEDIN, LORDS SHAW
AND SINHA, SIR JOHN WALLIS
AND SIR LANCELOT SANDERSON

Mukund Dharman Bhoir and others—
Appellants.

v.

*Balkrishna Padmanji and others—*Res-
pondents.

Privy Council Appeal No. 117 of 1925.

* *Hindu Law—Joint family—Coparcener has indefeasible right of partition—Evidence Act, S. 115.*

In the absence of a separation or division of the joint family property, a member of the joint family has an indefeasible right to demand partition and his right is not affected by a deed executed by his father on the basis that there was no joint family or joint family property.

[P 223 C 2, P 227 C 1]

L. DeGruyther, J. M. Parikh and J. M. Mehta—for Appellants.

G. R. Lowndes and E. B. Raikes—for Respondents.

Sir Lancelot Sanderson.—This is an appeal by Mukund Dharman Bhoir, Govind M. Bhoir, Ramchandra M. Bhoir and Harishchandra M. Bhoir, who were defendants 1 to 4 in the suit, against a

judgment and decree of the High Court of Bombay dated the 4th October 1922.

The suit was brought by Balkrishna against the above-mentioned first four defendants, Padman, defendant 5, who was the plaintiff's father, Malji, defendant 6, the plaintiff's brother, Sowari, defendant 7, the sister of Padman, and other defendants whom it is not necessary to mention in detail. Krisnaji Ramchandra Lele and Jagunnath Raghunath Shet were added as defendants subsequently.

Krisnaji had purchased from the plaintiffs, after the institution of the suit, a 20-pie share of the plaintiff's share in the property which was the subject-matter of the suit. Jagunnath had purchased from Padman and Malji a 40-pie share of their share in the property.

These two defendants, Krisnaji and Jagunnath, are the only respondents who have appeared on the hearing of this appeal.

The learned counsel, Sir G. Lowndes, who appeared for them, stated that in view of the fact that the only question argued before the Board was as to the amount of the shares of the plaintiff and his brother Malji, and having regard to the nature of the argument which was presented by the learned counsel for the appellants, his clients' interests were fully protected, whichever way the appeal was decided.

Sir G. Lowndes, however, intimated that he had prepared an argument upon the merits of the appeal, and was prepared to present it to the Board as amicus curiae if their Lordships so desired. Accordingly, the learned counsel was heard on the merits.

The pedigree set out in the plaint shows the relationship of some of the parties hereinbefore mentioned, and is as follows:

(For pedigree See p. 225.)

Padman, defendant 5 and father of the plaintiff, was alive when the suit was instituted; he died during the pendency of the suit and before the learned Subordinate Judge delivered his judgment.

The suit was brought by the plaintiff for partition of the property described in Schs. A, B, and C of the plaint.

The properties were alleged to be the joint properties of a joint Hindu family which had been formed by Dharman and his two sons, Mukund and Padman, and

which was governed by the Bombay School of the Mitakshara Law.

The property contained in Sch. C was alleged by the defendant Sowari to have been given to her. The suit was dismissed so far as the property described in Sch. C was concerned. The High Court on appeal affirmed such dismissal, and no point in respect thereof was raised on the hearing of this appeal.

The appeal thereof is confined to the property described in Schs. A and B.

The property in Sch. A is that which the plaintiff alleged was in the possession of Mukund, defendant 1, and the property described in Sch. B was alleged to have been in possession of Padman, defendant 5, the plaintiff's father.

The defence of the appellants was threefold. In the first place, it was alleged that the property was not subject to partition, because there had been a prior partition in 1891 between Dharman and

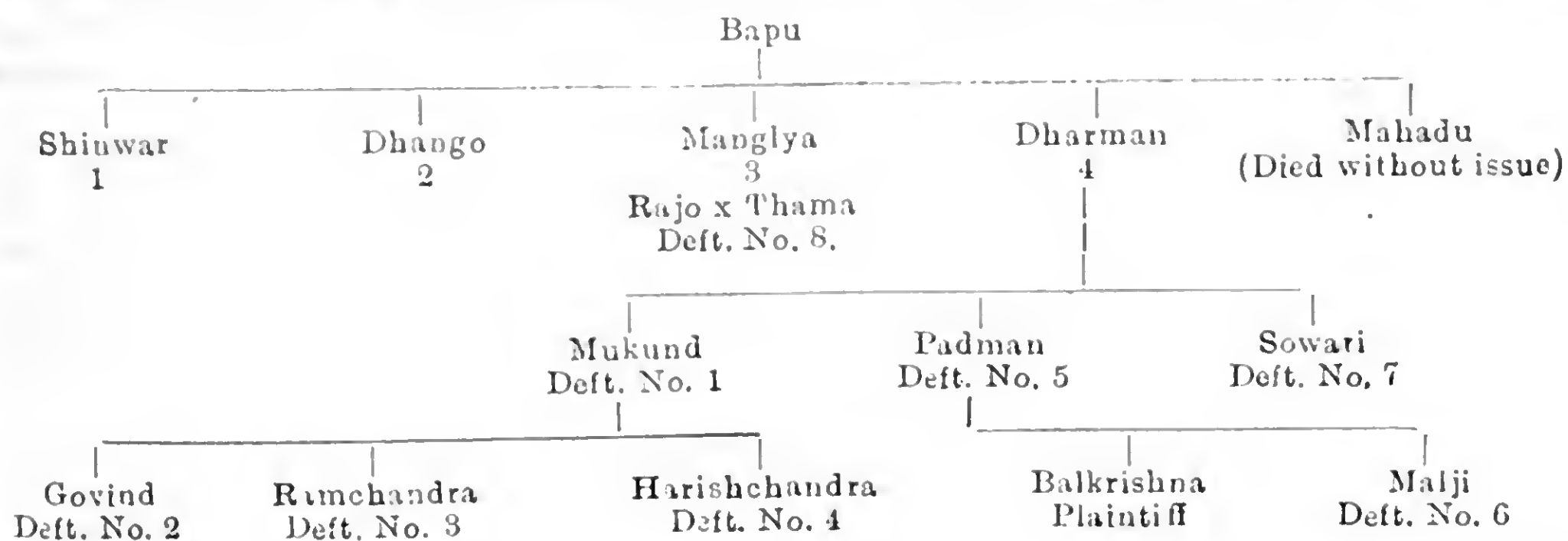
was argued on behalf of the appellants before their Lordships on the assumption that these findings must be accepted.

The only question, therefore, which their Lordships have to consider and decide is the third, which relates to the document executed by Padman in 1907.

The facts, material to this point, are as follows:

Padman apparently was an idle and vicious young man, of weak intellect; he was looked upon as a burden to his family and was regarded as incapable of assisting in the management of the family estate. Accordingly, a part of the family estate was allotted to him as a provision for his maintenance, and he had to live separately from his father and brother.

It is, however, found as a fact that Padman did not know that his father and Mukund had any property which was ancestral, and in which he had an



Mukund on the one hand, and Padman on the other. Secondly, it was urged that the property was not subject to partition because it was self-acquired property of Dharman and Mukund, defendant 1. Thirdly, it was urged that Padman and his two sons separated in interest by a document, which was called a release, and which was executed by Padman in the year 1907.

No question arises before their Lordships as to the first and second of the above-mentioned defences.

The learned Subordinate Judge found that there was no partition in 1891, and that the property was not the self-acquired estate of Dharman and defendant 1 (Mukund), but that it was the joint family property of them, and Padman, and their sons.

These two findings were affirmed by the High Court on appeal, and the case

interest. He was not admitted into the confidence of either of them, and he did not know that the property which was allotted to him was part of the joint family estate.

It appears that the father Dharman made a will in 1904. It has been found by the learned Subordinate Judge that the will was void in so far as it related to the ancestral property of the joint family, and did not affect the rights of the plaintiff or his brother Malji.

In 1907, the document, to which reference has already been made, was executed by Padman. It is not necessary to set it out in detail, as its terms have been so fully discussed in the judgments of the Courts in India.

It has been called a release.

It is really more in the nature of a series of recitals or admissions that the whole of the property was the separately

acquired property of his father Dharman, that Dharman had made a will, that by virtue of the same, Mukund (defendant 1) had become full owner of the property after his father's death; that Dharman had given Padman certain property during his lifetime, and that he had been living separately from his father and Mukund; that Mukund had given him certain additional property in consequence of his poverty; and, finally, the document stated that Padman and his heir had no interest in the moveable and immovable property acquired by Mukund or his father, and that Mukund was the full owner of all the property except that which had been given to Padman.

The learned Subordinate Judge held that the document was executed by Padman under the conviction that all the estate was the self acquisition of Dharman and Mukund, that he, Padman, had no interest in it by birth, and that he could not make any claim to the property, as it had been disposed of by his father's will.

He held that it was binding on Padman, who thereby released his one-sixth share in favour of Mukund, but it was not binding on his sons, viz., plaintiff and his brother Malji. He decided that the plaintiff and his brother Malji were each entitled to one-sixth of the family estate.

Both the plaintiff and defendants 1 to 4 appealed to the High Court.

Mr. Justice Pratt held that the document of 1907 did not proceed on the footing of benefit at all, but on the basis of an eleemosynary allowance to a man who was entitled to nothing, and that the plaintiff and his brother Malji did not lose their interests in the joint family property by reason of the so-called release.

Mr. Justice Marten did not decide that the so-called release was binding on Padman, but, for the purpose of his judgment, the learned Judge was prepared to assume that it was so binding. The learned Judges held that the whole of the property, including that in the possession of Padman, should be thrown into the hotchpot and then divided between the surviving members (according to their respective shares), and that the release could not be treated as if one-sixth was taken out and had become the

separate share of Mukund and as if the other members were entitled to divide the balance only.

The result was that the High Court decreed that defendants 1 to 4 should take one-half of the estate and that the plaintiff, his brother Malji and the alienees (viz., defendants Krisnaji and Jagunnath) should take the other half according to the shares mentioned in the judgment.

It is clear that the whole of the property mentioned in Schs. A and B must be treated as joint property of the family of which Padman and his sons were members.

Although Padman, in consequence of his habits and his incapacity, had to live separately, and although certain property was allotted to him for his maintenance, it has been found as a fact that such property was much less than what his one-third share would have been, and that there never was, in fact, any partition of the joint property before 1907.

In their Lordships' opinion the sole question is whether, by reason of the deed of 1907, Padman and his two sons were separated in status from the joint family and whether there was at that time a partition of the joint family estate.

There is a twofold application of the word "division" in connexion with a partition.

In the first place, there is separation, which means the severance of the status of jointness. That is matter of individual volition; and it must be shown that an intention to become divided has been clearly and unequivocally expressed, it may be by explicit declaration or by conduct.

Secondly, there is the partition or division of the joint estate, comprising the allotment of shares, which may be effected by different methods.

In their Lordships' opinion the deed of 1907, does not operate either as a separation of status or as a partition of joint family property.

The deed proceeded upon the basis that there was no joint family and no joint family property. The basis was that all the property, including that which was in Padman's possession, had been separately acquired, and that all

the property, except that in possession of Padman, belonged to Mukund.

Further, by the deed, Padman agreed not to contest the genuineness or the contents of his father's will in consideration of the gift of certain property by Mukund.

There is no suggestion in any part of the deed that the parties were proceeding upon the basis that there was a joint family of which they were members, or that they were taking part in a division of the joint family property.

In their Lordship's opinion this disposes of the appeal, for it has now been ascertained that the property in dispute was, in fact, joint family property; that there never was a separation or division of the joint family property, and the plaintiff being a member of the joint family has an indefeasible right to demand partition.

Their Lordships are of opinion that the High Court's direction as to the division of the estate proceeded on a correct basis, and that the decree of the High Court in accordance therewith was rightly made.

They will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

R.K. *Appeal dismissed.*

Solicitors for Appellant—*T. L. Wilson & Co.*

Solicitors for Respondents—*Ranken, Ford & Chester.*

* A. I. R. 1927 Privy Council 227

(From Bombay : A. I. R. 1923 Bom. 471)

11th July 1927

LORDS SINHA, BLANESBURGH AND SALVESEN, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Ramgowda Annagowda Patil and others—Appellants.

v.

Bhausahab and others—Respondents.

Privy Council Appeal No. 42 of 1925.

* *Hindu Law*—*Reversioner taking benefit of a widow's transaction cannot set it aside—Evidence Act, S. 115.*

A reversioner, who is a party to and is benefited by a transaction entered into by a Hindu widow, is precluded from questioning any part

of it, and his sons cannot set it aside especially when he did not do so in his lifetime : *A. I. R. 1923 Bom. 471, affirmed.* [P 229 C 2]

E. B. Raikes and N. Atmaram—for Appellants.

G. R. Lowndes and W. Wallach—for Respondents.

Lord Sinha.—This is an appeal by the plaintiffs from a decree of the High Court of Bombay which modified a decree of the Subordinate Judge of Belgaum made in suit No. 203 of 1919.

That suit was instituted to recover possession of certain houses and lands from the defendants.

The properties in suit originally belonged to one Akkagowda who died in 1846, leaving two widows, Lingava and Tayava, and a daughter Kashibai, who was married to one Shivgouda and had a son Shidgouda.

Lingava died before 1868, but her co-widow lived till 1912, thus surviving her husband for 66 years.

Kashibai, the daughter, died in 1907, a few days after the death of her husband Shivgouda. Shidagouda, her eldest son, died in 1907, leaving an adopted son named Bhau (defendant 1).

Kashibai had a second son, Pirgouda (defendant 2) who, however, had been given in adoption to another family some years before Kashibai's death.

The pedigree of the family is as follows :

(For pedigree see p. 228.)

It is no longer in dispute that when the succession opened out on the death of Tayava in 1912, Annagouda was under the Hindu Law the nearest heir of Akkagouda, in preference to Bhau (defendant 1) and Pirgouda (defendant 2).

Tayava had alienated most of her husband's properties in 1868 by and under three deeds. By one of these she made a gift of certain of those properties to her brother Basappa; by another she purported to sell half of certain other lands to Annagouda himself for Rs. 2,000, and by the third she sold the other half of those properties to her son-in-law Shivgouda. There was only one small property left unalienated.

These three deeds were all executed and registered on the same day. The deed of gift in favour of Basappa was attested by Annagouda and Shivgouda; the deed of sale in favour of Shivgouda was attested by Annagouda and Basappa; and

the sale deed in favour of Annagouda was attested by Basappa and Shivgouda. And the widow as executant was identified before the Registrar in respect of all three deeds of Annagouda.

The latter subsequently in 1882 sold the properties purchased by him as aforesaid for Rs. 3,000. The properties purchased by Shivgouda remained in his possession till his death and afterwards of his grandson and son (defendants 1 and 2) and their tenant, defendant 3. Basappa's share passed by purchase to defendants 4 to 7.

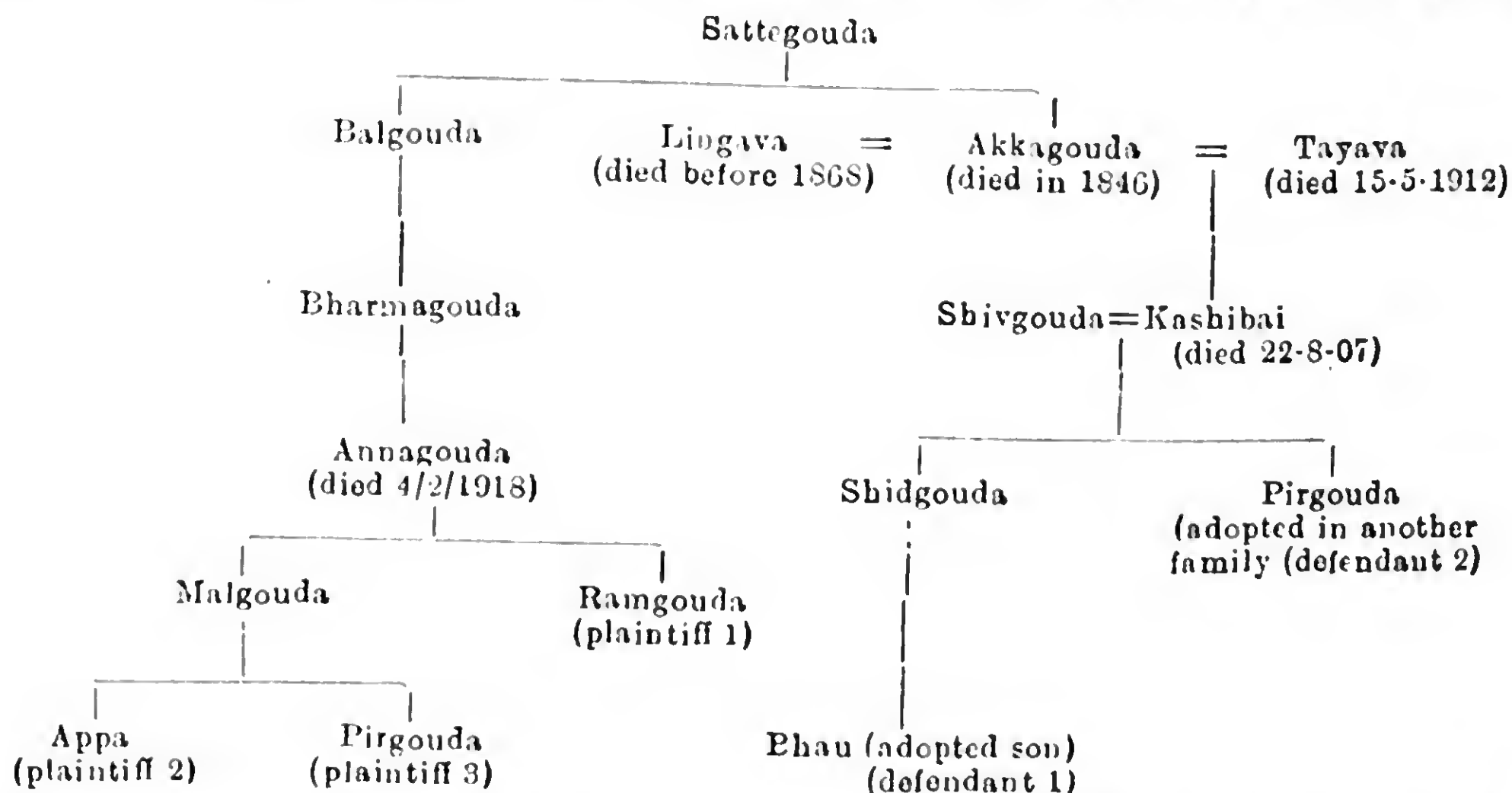
Annagouda, who survived the widow by nearly six years, did not in his lifetime seek to set aside the alienations in favour of Shivgouda and Basappa; but, after his death in 1918, his son and

The trial Court found in favour of the plaintiffs on both issues and gave them a decree.

The High Court held that no question of estoppel arose in the case; but on issue 2 held that both the gift to Basappa and the sale to Shivgouda by Tayava were binding on the plaintiffs, who, therefore, were entitled to recover in the suit only the small property which was not included in any of the three documents by her in 1868.

The grounds of their judgment may best be stated in their own words:

The transactions which were effected by Tayava with the consent of Annagouda and Shivgouda were evidently pre-arranged as a proper disposition of Akkagouda's property between these parties, and those transactions must be considered as a whole; and since



grandsons instituted the present suit, against all the defendants above named to recover those properties on the ground that the alienations thereof by the widow were not valid.

It is admitted that Annagouda became entitled to the succession in 1912 and that the plaintiffs claim under or through him and, therefore, have no better title to succeed in this suit than Annagouda had.

On the written statements filed by the defendants, issues were raised, of which the two material ones are:

1. Are the plaintiffs estopped from bringing this suit?

2. Do the defendants prove that the transactions of gift (to Basappa) and sale (to Shivgouda) are legal and valid and binding on the plaintiffs?

Annagouda received considerable advantage from giving his consent to Tayava's alienations, it would be most inequitable if his descendants, while retaining that advantage, should be allowed to set aside the other alienations.

It was contended before their Lordships on behalf of the appellants that the decision of the High Court was erroneous because:

1. The attestation by Annagouda of: (1) the deed of gift to Basappa and (2) the deed of sale to Shivgouda was no evidence of his consent to either of those transactions.

2. The deed of gift in favour of Basappa was admittedly not supported by legal necessity and no consent of reversioners, near or remote, could give it validity.

3. That even if Annagouda consented, such consent would not give validity to the sale to Shivgouda, as Annagouda was not the nearest reversioner at the time, inasmuch as the daughter Kashi-bai and her son Pirgouda were then alive and were nearer in succession.

4. That the sale to Annagouda himself did not estop him from questioning either the gift to Basappa or the sale to Shivgouda, as the transactions were separate and in no way interdependent, and that there was no such equity in favour of the defendants as the High Court assumed.

Their Lordships consider that the decision of this case depends upon how far the three documents can be taken as separate and independent, or so connected as to form one transaction.

The long lapse of time between the execution of the deeds and the institution of the suit has rendered it impossible to prove what actually occurred between the parties on that occasion. There is not sufficiently definite evidence to come to a conclusion as to how far any of those properties were validly encumbered or what was done with the purchase money alleged to have passed on the two deeds of sale.

But the parties to the documents included, or after so great a lapse of time may be presumed in a very real sense to have included, all persons who had any actual or possible interest in the properties, viz., the widow herself, her brother, who was a natural object of her affection and bounty, her son-in-law, who was the natural protector of the interests of her daughter and grandson, and the nearest kinsman on the husband's side and the only person from whom any opposition might be apprehended with regard to dealings by the widow concerning her husband's estate.

Their Lordships conclude that all the circumstances strongly point to the three documents being part and parcel of one transaction by which a disposition was made of Akkagouda's estate, such as was likely to prevent disputes in the future and, therefore, in the best interests of all the parties.

The three deeds appear thus to be inseparably connected together and in that view Annagouda not only consented to the sale to Shivgouda and the gift to

Basappa, but these dispositions formed parts of the same transaction by which he himself acquired a part of the estate.

It was argued that Annagouda's contingent interest as a remote reversioner could not be validly sold by him, as it was a mere *spes successionis*, and an agreement to sell such interest would also be void in law. It is not necessary to consider that question, because he did not in fact either sell or agree to sell his reversionary interest. It is settled law that an alienation by a widow in excess of her powers is not altogether void, but only voidable by the reversioners, who may either singly or as a body be precluded from exercising their right to avoid it either by express ratification or by acts which treat it as valid or binding.

If some person other than Annagouda had been, at the death of Tayava, the nearest heir of her husband, it might have been open to him to question all or any of the three deeds, but Annagouda himself being a party to and benefiting by the transaction evidenced thereby was precluded from questioning any part of it. Nor is it other than a most notable circumstance that he did not, after Tayava's death, essay to do so.

For these reasons their Lordships agree with the conclusion arrived at by the High Court and would humbly advise His Majesty that this appeal should be dismissed with costs.

R K.

Appeal dismissed.

Solicitors for Appellants—*T. L. Wilson & Co.*

Solicitors for Respondents—*Ranken, Ford & Chester.*

A. I. R. 1927 Privy Council 229

(*From Allahabad*)

12th July 1927

LORD BLANESBURGH, SIR JOHN WALLIS
AND SIR LANCELOT SANDERSON

Lala Jagmohan Saran—Appellant.

v

Sahu Deoki Nandan and others—Respondents.

Privy Council Appeal No. 24 of 1926,
Allahabad Appeal No. 12 of 1922.

Limitation Act, Art. 118—Suit in substance for declaring an adoption invalid is covered by Art. 118.

Where an action is in truth and substance a suit for a declaration that a particular adoption was invalid, and it is found that the fact that a claim was being made on the basis of this alleged adoption was known to the plaintiff in the suit more than six years before it was instituted, and that he himself had attained majority nearly nine years before the suit was commenced :

Held : that the suit was barred by Art. 118.

[P 230 C 1]

A. M. Dunne and B. Dube—for Appellant.

G. R. Lowndes and W. Wallach—for Respondents.

Lord Blanesburgh.—As a result of the opening of this appeal by Mr. Dunne, it is possible for their Lordships to dispose of the case on a very short ground. It has been made clear that this action is in truth and substance a suit for a declaration that a particular adoption was invalid. It is plain that the fact that a claim was being made on the basis of this alleged adoption was known to the plaintiff in the suit more than six years before it was instituted, and that he himself had attained majority nearly nine years before the suit was commenced. The suit being in substance one for a declaration to the effect just stated, their Lordships, on these uncontested facts, are of opinion that it is barred by Art. 118, Limitation Act. In these circumstances no useful purpose would be served by any further examination here and now of the matters in controversy, and for the reason that the suit is out of time their Lordships will humbly advise His Majesty that this appeal by the plaintiff should be dismissed. The appellant must pay the costs.

D D.

Appeal dismissed.

Solicitors for Appellant — *Barrow, Rogers & Nevill.*

Solicitors for Respondents — *T. L. Wilson & Co.*

* A. I. R. 1927 Privy Council 230

(From Lahore)

19th July 1927

VISCOUNT DUNEDIN, LORDS SHAW AND SINHA AND SIR JOHN WALLIS

Sardar Gurbakhsh Singh—Appellant.

v.

Gurdial Singh and another—Respondents.

Privy Council Appeal No. 112 of 1925.

* *Practice—Witness—Party should be offered as witness.*

The practice of not calling the party as witness with a view to force the other party to call him, and so suffer the discomfiture of having him treated as his, (the other party's) own witness is a bad and degrading practice. 32 All. 104 (P. C.) Ref. The true object to be achieved Court of justice can only be furthered with propriety by the testimony of the party who personally knowing the whole circumstances of the case can dispel the suspicions attaching to it. The story can then be subjected in all its particulars to cross-examination. [P 231 C 1]

A. M. Dunne and B. Dube—for Appellant.

L. DeGruyther and J. M. Parikh—for Respondents.

Lord Shaw.—This is an appeal against a judgment and decree dated the 9th April 1924, of the High Court of Judicature at Lahore, which reversed the judgment and decree of the 1st December 1919, of the Subordinate Judge at Ludhiana.

Sardar Jawala Singh was a jaghirdar possessed of certain properties in the Ludhiana and Ferozepore Districts of the Punjab. He lived in the village of Bhikki Khatra, in the Ludhiana District.

Jawala died on the 19th August 1915, leaving two widows. The elder, Harnam Kuar, was childless. The younger, Bhagwan Kuar, had borne to him a daughter, who at the date of his death was ten years old. These constituted the household.

It is admitted that according to the law in operation in that part of the Punjab, if there had been a son in the household, he would have succeeded to the properties; but that, failing a son, and there being only a daughter, the estate would fall to a collateral male relative. That relative was a step-brother named Gurbakhsh Singh, who is the present appellant. If, however, a posthumous son was born, then that

posthumous son would, of course, succeed, the household would be kept together, and Gurbakhsh, the step-brother, would have no rights.

The story of this litigation, and of various other proceedings, partly legal and partly administrative, which preceded it, hangs upon the question whether such a posthumous son ever was born. It appears clear that a possible attempt to procure a spurious son was in the minds of all parties from the moment of Jawala's death, or even before that. He died on the 19th August 1915.

The appellant maintains that no such posthumous son was born. Almost immediately after the death he proceeded to raise the question. Simultaneously, or almost simultaneously, Bhagwan, the younger widow, disappeared.

Every day was of importance for the defeat of a plot, if plot there was, and for the immediate discovery of the truth. There seems to be little doubt that dissatisfaction arose as to the delay of the patwari of the village in taking action. It is a fact that the death having occurred on the 19th August, the patwari only entered the fact in his diary so late as the 29th August.

In the mutation register, which purports to be dated the 23rd August 1915, but which was only in reality completed on the 29th, there is in the last column the following entry :

To-day, Bachittar Singh, a co-sharer of mauza Attari, stated :

Jowala Singh, a co-sharer and jaghirdar of mauza Attari, died sonless on the 19th August 1915. Msts. Harnam Kaur and Bhagwan Kaur his widows, are entitled to succeed to the property left by him in equal shares. A report regarding the death with regard to the jaghir has been separately submitted to the tahsil. Hence the mutation entry relating to the khata is submitted.

He also states that Mt. Bhagwan Kaur is pregnant.

Dated the 23rd August 1915.

(Signed) BACHITTAR SINGH,
Declarant.

There remains in the case very considerable doubt as to when the words, "He (Bachittar Singh) also states that Mt. Bhagwan Kaur is pregnant," were entered. As will be shown, Bachittar Singh, the alleged informant, was not examined as a witness.

On the 31st August, Gurbakhsh, by a petition to the mutation officer, claimed that the property was his. By this time the parties were undoubtedly at arm's

length. Gurbakhsh, the step-brother, appellant had applied to the Collector; the application has not been found, but at least by the 14th September an application was lodged which frankly made the charge of the attempt to procure a spurious son.

In our family there is a custom that when a member died sonless his collaterals get his jaghir, and his widows are entitled to get maintenance only. They support themselves with the income of the ancestral land. The village Patwari has colluded with his (deceased's) widow. He made a false and fictitious report in the mutation register to the effect that Mt. Bhagwan Kaur is pregnant, whereas she is not at all pregnant. Our rights are prejudiced owing to collusion with the patwari. Mt. Bhagwan Kaur (she was the second and much the younger of the two widows) may be got medically examined by a doctor so that she may not procure a spurious son. If she procured a son somewhere or is trying to procure a son, we do not accept him. It is, therefore, prayed that local enquiry may be got made by a tahsildar and relief granted.

This challenge should, as was meant, have brought matters to a head. The request made was reasonable. The condition of Bhagwan was the critical and conclusive fact in the case. Without any doubt whatsoever she should have appeared, if her case was true; her condition of advanced pregnancy would have been plainly enough established in the course of that enquiry. She did not so appear. The proceedings were delayed. The Deputy Commissioner, on the 13th October, demanded to know what had become of the matter.

Meantime events ripened, or were alleged by the elder widow to have ripened, by the alleged birth of a son to Bhagwan in a remote village of an adjoining native state.

Gurbakhsh at once took action, and on the 21st October, another application was made to the Collector, which narrated as follows :

After his death Mt. Bhagwan Kaur, in order to prejudice my rights, gave out, in consultation with the village patwari, that she was pregnant, whereas she was not at all pregnant. I filed applications in your Court praying that enquiry may be got made at the spot or the woman may be got medically examined, but up-till now no attention has been paid to those applications.

Then follows the second stage of the case :

But a short time ago Mt. Harnam Kaur (that is, the elder widow) gave out that a son was born, nor is it known where was Mt. Bhagwan Kaur, nor yet did she tell on what date and in which village the son was born. This is all fraud.

This is the one side, namely, the step-brother's allegations. It is, however, interesting to know what was the admitted attitude of the widows themselves upon the important subject of the possibility of a spurious son.

In the application before the Collector, Mt. Harnam Kaur, the elder widow, made the following statement on the 25th October, 1915 :

The name of my co-wife is Mt. Bhagwan Kaur. Our husband died about two months ago.

and then there follow these words :

About a month after his death, I sent her to my parents' house for the reason that she might, perhaps, give birth to a daughter and might go to her parents' house and secure a spurious son in order to prejudice my rights.

This is a curious statement, but in some respects it has obvious importance. It shows that the departure from the family home was deliberate. Next, the disappearance was in the mind of this co-widow connected with the birth or the production of a son. Further, the elder widow was to manage the affair of the residence of the younger.

This deliberate design was followed by the departure of the second widow, who went off in the first place to her own parents' house. This was natural and usual : but she was only there a day or two when she was taken therefrom by a nephew of the first widow, and immediately thereafter to Patiala, outside British territory and in a native state. Not content with this, she was again removed by him from Patiala to his own residence at a place called Lakha Singhwala, in Nabha, also a native state. This nephew states that his aunt Harnam wished him to take Bhagwan from Patiala to Lakha Singhwala in order to avoid the apprehended change from a girl to a boy.

The facts of these changes of residence are undoubted ; but their Lordships do not believe a word of the story as to the object of the journey, or as to the absentee widow having borne a son.

The Board does not go into the details further than to say that it is satisfied with the interpretation put upon them by the Subordinate Judge. They think it true to say firstly, that the suggestion of an apprehended change from a girl to a boy is without any foundation whatsoever. Secondly, the deliberate removal from her home and even from the home of her own parents to these two different

places in a foreign state was effected with the object of destroying traces of her whereabouts, of making it practically impossible compulsorily to secure her medical examination, of making it possible to lay a foundation for the fraud of obtaining a spurious son and of maintaining thereafter that in this remote place she herself had given birth to it. Their Lordships, in short, agree, on the whole of that part of the case, with the views of the Subordinate Judge.

One or two points, however, may be stated in addition. It was argued that the statement as to pregnancy attributed to Bachittar Singh was interpolated by the patwari in the original record of the death of Jawala Singh. The challenge was made before the proceedings, either before the Collector or in this suit, were instituted, and it is striking and suspicious that Bachittar Singh, to whom this statement was attributed, was not called as a witness to clear up the point, or to state upon what information his alleged statement was made.

There may be very considerable doubt as to whether the statements made before the Collector, which truly did not form a part of the present *lis*, should have been admitted in these civil proceedings. The thing, however, was done. As already mentioned, the appellant took action almost at once to have the truth as to Bhagwan's condition investigated. She, however, disappeared, and it was practically impossible for a private litigant to fetch her back, or possibly even to ascertain her whereabouts. The investigation proceeded in the Collector's tribunal, and on the 12th November the revenue assistants reported to the Deputy Commissioner that the boy was fictitious.

It may be remembered, however, that there being a report circulated that Harnam was certain that a son was born, Gurbaksh instantly took action. By another application of the 21st October he requested that some high officer might be specially sent to the spot and a thorough inquiry made so that the true facts might come to light. The authorities could not use force beyond the British frontier, and in the course of the further proceedings on the 2nd February 1916 the following order was pronounced by the presiding officer of the revenue Court :

Mt. Bhagwan Kaur is keeping out of the way and cannot be found. Sardarni Harnam Kaur be summoned to Ludhiana for the 21st February 1916. Her whereabouts be inquired from Sardar Bahadur Sardar Gajjan Singh and Mr. Sarab Kishen. They state that they do not know where the Sardarni Sahiba is, nor did any mukhtar of her come to them again.

A last opportunity was given, but Bhagwan did not appear until the 3rd March, accompanied by a boy to which she maintained she had given birth in the previous October.

It appears clear to their lordships that she was purposely keeping out of the way, not only from August 1915, when she disappeared, but from October, when her alleged son was born. This further delay from October to March, about five months, was also deliberate. It was for the purpose of preventing the possibility of any medical examination of her after such a long period throwing light upon the question of the birth of a child by her in October. The Assistant Collector, however, heard her, and he was in no way moved by her evidence. "The statement," says he, "of Mt. Bhagwan Kaur has been taken down. Even after hearing her I see no reason to alter my first view."

Further proceedings took place in the revenue Courts, and then this civil suit followed. As already indicated, their Lordships see no reason to doubt either the great carefulness of the investigation made by the Subordinate Judge, or the soundness of the conclusions at which he arrived. The disappearance of Bhagwan, and the manifest approval of the co-widow, the refusal by her to come to the Court to submit to a medical examination, or even to remain for a reasonable period in her own old home, but in preference to go outside the jurisdiction of the Court and into a native state, would in any view have thrown the greatest doubt upon the story of her having given birth to a son as alleged; and then the second feature of the case—her continued absence for a long period after the alleged birth—the whole of this appears to their Lordships to be but part of a transaction which was simply a nefarious plot.

It must be stated that in taking a different view the High Court went very far, as, for instance, when they say: "We do not find any proof that Bhagwan Kaur did, in fact, shirk examination."

Their lordships think it unnecessary to repeat the numerous details of the story, but, as it involves a general and important question of procedure and practice, they think it expedient to make the following reference to what occurred at the trial of this civil suit. At the Bar of the Board it was admitted by the respondents that she, Bhagwan, had been present in Court when the evidence was being taken, and that she did not go into the witness box, and was not examined as a witness on her own or her alleged son's behalf.

Notice has frequently been taken by this Board of this style of procedure. It sometimes takes the form of a manoeuvre under which counsel does not call his own client, who is an essential witness, but endeavours to force the other party to call him, and so suffer the discomfort of having him treated as his, the other party's, own witness.

This is thought to be clever, but it is a bad and degrading practice. Lord Atkinson dealt with the subject in *Lal Kunwar v. Chiranji Lal* (1), calling it "a vicious practice, unworthy of a high-toned or reputable system of advocacy."

The present case, however, is a pointed instance of the evils which flow from such a practice. Bhagwan's case had been the subject of prolonged investigation in the revenue Courts, and had been pronounced by them a bogus case. She had appeared and told a story there, and it had not been believed. She was, however, also present in this civil suit, the issue in which was the legitimacy of the boy that she was putting forward as the jaghir of the estate. Her non-appearance in answer to the challenge, that is to say, to disclose the actual fact as to her condition shortly after her husband Jawala's death, her disappearance into a foreign state, and all the other circumstances mentioned, had been established. If her story were, notwithstanding all this, a true story, it was her bounden duty to give evidence in the suit, telling the whole facts in support of her and her alleged son's case; but she did not. If under advice she did not do so, that advice was of the worst description, and worthy of the animadversion above made. But in any view her non-appearance as a witness, she being present in

(1) [1910] 32 All. 104=5 I. C. 549=37 I. A. 1 (P. C.).

Court, would be the strongest possible circumstance going to discredit the truth of her case.

How did the High Court deal with this? They say:

It is true that she has not gone into the witness box, but she made a full statement before Chaudhri Kesar Ram, and it does not seem likely that her evidence before the Subordinate Judge would have added materially to what she had said in the statement.

Their lordships disapprove of such reasoning. The true object to be achieved by a Court of justice can only be furthered with propriety by the testimony of the party who personally knowing the whole circumstances of the case can dispel the suspicions attaching to it. The story can then be subjected in all its particulars to cross-examination.

To say that she would likely have repeated what she had already said omits the entire force of the consideration as to cross-examination, and their lordships cannot doubt that if this part of the case had been treated from the point of view consistent with sound practice, as just stated, the High Court could never have reached the conclusion come to.

Their lordships will humbly advise His Majesty that the appeal should be allowed, and the judgment of the Subordinate Judge restored with costs here and below.

D.D. *Appeal allowed.*

Solicitors for Appellant — H. S. L. Polak.

Solicitors for Respondents — T. L. Wilson & Co.

** A. I. R. 1927 Privy Council 234

(From Rangoon: A. I. R. 1925

Rang. 242.)

26th July 1927

LORDS SINHA, BLANESBURGH AND
SALVESEN, SIR JOHN WALLIS AND
SIR LANCELOT SANDERSON.

Maung Po Nyun—Appellant.

v.

Ma Saw Tin—Respondent.

Privy Council Appeal No. 62 of 1926.

** (a) *Buddhist Law (Burmese)—Divorce—Wife deserted and hence obtaining divorce—She cannot get husband's whole property.*

* The proposition that where the husband deserts his wife, who subsequently sues for divorce

and succeeds, the wife is entitled to divorce with possession of all the husband's interest in the property, is in itself a startling proposition and cannot be accepted, and there is no case known in which even a claim based on such a proposition has been made. There is no text in the Dhammathats or in Burmese Buddhist law books to support it nor is there any case-law on the subject. [P 236 C 2, P 237 C 1]

(b) *Buddhist Law (Burmese)—Divorce—Wife granted one-third of husband's property on divorce—Decree was upheld by Privy Council.*

Where it was found that the marriage of defendant (husband) with the plaintiff (wife) was brought about by misrepresentation, that the plaintiff was an entirely innocent party, that the facts relating to the desertion were of an aggravated nature and quite unjustifiable, and the Courts in India granted her a third share in the property given to the husband by his mother:

Held: that the decree appealed from cannot be said to be unreasonable or contrary to justice, equity and good conscience: A. I. R. 1925 Rang. 242, Affirmed. [P 237 C 1]

A. M. Dunne and E. B. Raikes—for Appellant.

A. P. Pennell—for Respondent.

Sir Lancelot Sanderson.—This is an appeal by Maung Po Nyun, who was the defendant in the suit, against a decree of the High Court of judicature at Rangoon, dated the 27th February 1925, affirming a decree of the District Judge of Myaungmya, dated the 13th December 1923. The plaintiff, who is the respondent in this appeal, brought the suit against her husband, claiming a divorce on account of his desertion and a partition of the properties specified in the Schs. A and B of the plaint. She alleged that she was entitled to one-third of the properties in Sch. A and to one-sixth of the profits in Schedule B. The learned District Judge made a decree granting the plaintiff a divorce and the shares in the above-mentioned properties which she claimed. The defendant appealed to the High Court, which dismissed his appeal with costs. At the hearing of the appeal before their Lordships, the learned counsel, who appeared for the appellant-defendant, did not contest the plaintiff's right to a decree for divorce, and the arguments on both sides were confined to that part of the decree which awarded to the plaintiff one-third of the properties mentioned in Sch. A and one-sixth of the profits specified in Sch. B. The learned counsel for the appellant-defendant did not contest the plaintiff's right to the one-sixth

of the profits in Sch. B, but he argued that the plaintiff was entitled merely to one-sixth of the property comprised in Sch. A and not to one-third thereof, as decreed by the Courts in Burma. The appeal, however, involves much more than the point which has been stated above, and that is by reason of a principle which was adopted by the Courts in Burma and upon which they based their judgments. For the moment it may briefly be referred to in the words of the learned District Judge as follows:

Where a divorce is adjudged through the fault of one party, the innocent party obtains all the property, including the joint property as well as the separate property of the guilty spouse.

It is clear, therefore, from the above-mentioned statement, that this appeal involves a question of great importance, and it is necessary for their lordships to decide whether this statement of the law, which must obviously have far-reaching effects, can be supported.

The facts of the case may be shortly stated as follows:

The defendant had married another wife before he married the plaintiff. The first wife lived with the defendant and his adoptive mother for some time, and then, in consequence of quarrels, the wife left the defendant and went to live with her parents. A few months later the defendant expressed a desire to marry the plaintiff, and his mother accordingly approached the plaintiff's parents with a view to their daughter's marriage. The defendant had told his mother that he had severed his connexion with his first wife, and accordingly the defendant's mother, when asked by the plaintiff's parents as to the first marriage, assured them that the defendant had divorced his first wife. The plaintiff's parents, having received this assurance, consented to their daughter's marriage. She was married the same day and she went to live with the defendant and his mother. A few months later the defendant's mother died. The defendant continued to live with the plaintiff for about two months longer, and then, in or about April 1920, he left her and went to live with his first wife, whom, in fact, he had not divorced. The suit was filed in September 1923, more than three years after the plaintiff was deserted by the defendant, and it was found by the learned District

Judge, and his finding has not been disputed, that during the period from April 1920 up to September 1923, the defendant did not resume conjugal relations with the plaintiff, and did not give her any maintenance.

The learned Judge found that the defendant deserted the plaintiff and that the marriage was brought about by the above-mentioned misrepresentation that his connexion with his first wife had been severed, and he held that the plaintiff was entitled to a decree for divorce. The High Court agreed that the plaintiff was entitled to a decree for divorce, and that part of the decree, as already stated, has not been contested before their lordships. It appears that the defendant's mother died in January 1920, and that about four months before she died she had given to the defendant by deed about 185 acres, which were part of the 233.38 acres mentioned in Sch. A. After her death her inheritance was divided, the defendant getting the house and the remainder of the property mentioned in Sch. A, which included 29 acres which had been given shortly after the defendant's marriage with the plaintiff.

On the question of partition, both the Courts in Burma held that, inasmuch as the plaintiff was entitled to a divorce on the ground of the defendant's desertion, she was, strictly speaking, entitled to all the husband's property, except the first wife's interest therein; or, stating the same proposition in another way, that the plaintiff was entitled to all the husband's interest in the property, which would be considerably more than the shares which the plaintiff had claimed in her plaint. The learned Judges of the High Court expressed the opinion that it was difficult to understand on what principle the plaintiff's claim was based; but they came to the conclusion that as she had confined her claim to the shares mentioned in the plaint and had obtained a decree in respect thereof, they saw no reason for saying that the decree was wrong or that the defendant had been prejudiced by it.

The question whether the plaintiff was entitled to all the husband's interest in the property was argued at great length, and the attention of their lordships was drawn to the translations of many of the Dhammathats and to many reported decisions. Their lordships do

not think it necessary to refer to them in detail, because it is clear, as was admitted by the learned counsel who appeared for the plaintiff, that there is no text which imposes forfeiture of property upon a husband who deserts his wife, and that there is no reported case in which a decree for forfeiture of his property has been made against a husband by reason of his desertion of his wife or one of his wives. Further, the learned Judges of the High Court stated that: it is admitted that the Burmese law-books do not lay down any rule of partition on the divorce of the husband by one of two or more wives of equal status, and that there is no case-law on the subject. It is, therefore, necessary to decide the matter in accordance with the principle of justice, equity and good conscience, having regard to the general rules of Burmese Buddhist Law so far as these rules can be applied.

Their lordships desire to make it clear that the opinion expressed by them is confined to the particular facts of this case and the question arising in respect thereof, viz.: assuming that the defendant deserted the plaintiff, his second wife, in April 1920, and that for more than three years he did not resume conjugal relations and gave her no maintenance, and that consequently the plaintiff was entitled to a decree for a divorce, was she entitled to the whole of the husband's interest in the property, which was the subject-matter in the suit? The learned counsel for the appellant argued strenuously that on the true construction of the plaint the suit was really based on an allegation of divorce by mutual consent. Their lordships are not able to accept that argument, and the case must be considered upon the basis of the findings of fact of the Courts in India. The learned District Judge began his judgment on this part of the case by saying:

The parties will have to be considered as a virgin couple.

Before his marriage with the plaintiff, the defendant had been married to another woman, who was alive at the time of the marriage with the plaintiff, and from whom he had not been divorced. The plaintiff, of course, had not been married before, and, while some indications are to be found in the texts to the effect that where the spouse in that position is the aggrieved party, the union may be so described in proceedings for divorce, in their lordships' opinion, it is not necessary in this case to decide the

point and they must not be taken as affirming the above-mentioned proposition. The learned District Judge then proceeded to the statement which has already been quoted, and which for convenience may be restated, as follows:

Where a divorce is adjudged through the fault of one party, the innocent party obtains all the property, including the joint property as well as the separate property of the guilty spouse; but, of course, the share of the head wife must be excluded.

In their lordships' opinion, this statement is made in too wide and too general terms. In the first place, it takes no account of the difference between the position, rights and duties of the husband and those of the wife in Burmese law. It is clear that the Dhammathats recognized the difference in many respects, which it is not necessary to mention in detail. In the second place, as has already been stated, there is no case in which a wife has obtained a decree of forfeiture of all her husband's interest in the property on the ground of his desertion. It is also the fact that there is no case in which a wife has claimed such a forfeiture, and even in the case before their lordships the plaintiff has not made such a claim. As already mentioned, the Dhammathats do not contain any text which provides that if the husband deserts his wife, or one of his wives, she is entitled to the whole of her husband's interest in the property. In the digest of Burmese Buddhist Law arranged by U Gaung, Vol. II, dealing with marriage, S. 312 (Manugye), desertion is dealt with, and some of the rights of the parties ensuing upon desertion, such as the right to marry again, are described. If it had been the law that the husband would forfeit all his interest in the property, joint or separate if he deserted his wife, or one of his wives, for three years and left her without maintenance, it is almost inconceivable that there would not have been found in the Dhammathats a statement of the law to that effect.

The proposition which the Courts in Burma adopted as the basis of their judgment, viz. that because the defendant deserted the plaintiff she was entitled to divorce with possession of all the husband's interest in the property, the subject-matter of the suit, is in itself a startling proposition, and if adopted would have very far-reaching

effects. There is no text in the Dhammathats or in the Burmese Buddhist law books to support it, there is no case law on the subject, and the respondent's learned counsel was not able to draw their lordships' attention to any case in which even a claim based on such a proposition had been made.

In these circumstances, their lordships are not prepared to accept and endorse the above-mentioned proposition. This, however, does not dispose of the appeal, because it still remains to be considered whether the appellant-defendant has succeeded in showing sufficient reason to justify their lordships in interfering with the decree which the plaintiff in fact obtained as to her shares in the property and the profits thereof.

In deciding this question, their lordships think it is material to take into consideration the general rules of the Burmese Buddhist law as regards the interest which the wife obtains in the husband's property at the time of the marriage, and in the property acquired by him after the marriage, and the fact that the Dhammathats treat the division of property as part of the law of divorce, as to which there does not seem to be any serious dispute. In their opinion it is also material and important to consider the facts of this case; as, for instance, that the marriage with the plaintiff was brought about by misrepresentation that the plaintiff was an entirely innocent party that, shortly stated, the facts relating to the desertion were of an aggravated nature and unjustifiable, and that desertion, where there is a duty to comfort and support is regarded by the Burmese as a serious offence. Taking these matters into consideration and the above-mentioned rules of the Burmese law as to the wife's interest in her husband's property, their lordships are not prepared to say that the decree appealed from, which awarded to the plaintiff the shares in the properties in suit specified therein, was unreasonable or contrary to justice, equity and good conscience.

Their lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

D.D.

Appeal dismissed.

Solicitors for Appellant — Douglas Grant & Dold.

Solicitor for Respondent — J.E. Lambert

* A. I. R. 1927 Privy Council 237

(From Rangoon)

1st July 1927.

VISCOUNT DUNEDIN, LORDS SHAW AND SINHA AND SIR JOHN WALLIS.

V. E. A. R. M. Firm and another—Appellants.

v.

Maung Ba Kyin and another—Respondents.

P. C. A. No. 85 of 1926.

* Civil P. C. O. 21, R. 58—Property sold attached by vendor's creditor—Creditor must show that the sale was fraudulent.

Where the ostensible owners of the property under a duly registered deed and a deed of transfer object to an attachment by a party claiming to attach that property under his debt due from the vendor, the person attaching must show that the sale was a fraudulent one. [P 238, C 2]

Where it was found that the total value of the property sold was only Rs. 20,000 of which Rs. 17,000 was an absolutely good consideration and had passed. Held that insufficient proof of the passing of the remaining Rs. 3,000 was not enough to allow the Court to draw the conclusion that it was a fraudulent sale. [P 238 C 2]

A. M. Dunne and E. B. Raikes—for Appellants.

Viscount Dunedin.—In September 1920, one Po Hla, who was proprietor of certain real property, executed a mortgage of that property in favour of Upe for Rs. 10,000. At the same time, he also executed a promissory note in favour of Upe for Rs. 5,000, and what has been said in the judgments below may be anticipated by saying that it has been found that these transactions were quite genuine transactions and represented a mortgage and a promissory note executed for a real debt. Now time went on and inasmuch as interest had not been paid, when it comes to the critical date with which we shall have presently to do, the state of affairs was this: that these Rs. 10,000 and Rs. 5,000 respectively had with interest grown into a sum of Rupees 17,000, of which, of course, only part was under the mortgage and the other was merely an ordinary debt.

Now in 1922, Po Hla executed a deed of sale to Maung Ba Kyin and Ma Sein. Ba Kyin was the son of Upe, his creditor, and Ma Sein was his own daughter. It is quite evident that the idea of this transaction was that Upe, in respect that it was his own son, was willing that his debt of Rs. 17,000 should be taken as part consideration of the price to be paid. The price agreed upon was Rupees

20,000, and it seems quite clear on the transaction that the Rs. 17,000 was quite rightly taken as consideration, leaving, of course, the Rs. 3,000 to be paid in cash.

Now in the meantime, in 1921, Po Hla had executed a promissory note for Rs. 12,000 in favour of the Chetty firm, who are the appellants in this action, and the proceedings in the matter began by this Chetty firm suing upon the promissory note and then proceeding to put an attachment on what may be called Po Hla's old property. These two, the husband and the wife, who were the ostensible owners of the property, being owners in respect of a duly executed and registered deed of transfer, put in a claim under O. 21, R. 58, to have the attachment removed, and, having failed, instituted the present suit under O. 21, R. 63, to establish their right.

Now they being the ostensible owners of the property under a duly registered deed and a deed of transfer, obviously the party claiming to attach that property for somebody else's debt, not their debt, but the debt of the original debtor must show that the sale was a fraudulent one, and that could only be done in this case (there is no other evidence) by showing utter inadequacy of consideration. So far as the Rs. 17,000 was concerned, there was adequacy of consideration. Therefore, there only remains the Rs. 3,000. No doubt the evidence is in a very ragged condition as to precisely where and when that money was paid and, if it was necessary to show it was paid in hard cash, probably such proof would fail. But their lordships take this view: that supposing that it was not established, inasmuch as it has been held by the Judges below that the total value of the property was only Rupees 20,000, this Rs. 17,000 being an absolutely good consideration, the remaining Rs. 3,000 is not enough to allow them to draw the conclusion that it was a fraudulent sale.

Their lordships will, therefore, humbly advise His Majesty to dismiss the appeal. The appeal has been heard ex parte, so there will be no order as to costs.

D.D.

Appeal dismissed.

Solicitors for Appellants.—Bramall & Bramall.

* A. I. R. 1927 Privy Council 238

(From Bombay : A. I. R. 1925 Bom. 197.)

26th July 1927

VISCOUNT SUMNER, LORDS SINHA AND
BLANESBURGH, SIR JOHN WALLIS
AND SIR LANCELOT SANDERSON.

Secretary of State for India — Appel-
lant.

v.

Mt. Girjabai—Respondent.

Privy Council Appeal No. 116 of 1925.

* *Saranjam—Resumption by Government—Not only land revenue but all benefits secured by the grantee in virtue of the grant go to Government—A. I. R. 1925 Bom. 197, reversed.*

The grantee of saranjam grant is not entitled to create in his own favour occupancy rights in lands unoccupied at the time the grant was made or held by others then but forfeited on one ground or another during the subsistence of the grant. When the saranjam is resumed, the Government becomes entitled to resume not only the land revenue, but also all the rights and benefits that the grantee had secured by virtue of his grant : A. I. R. 1925 Bom. 197, *Reversed* ; 10 Bom. 112, *Dis. from.* ; 6 Bom. 598, *Dist.*

[P 242 C 1, 2]

G. R. Lowndes and K. Brown—for Ap-
pellant.

L. DeGruyther and E. B. Raikes—for
Respondent.

Lord Sinha.—This is an appeal against a decree of the High Court of Bombay, dated 15th August 1924, which varied the decree of the District Court of Nasik, dated 28th February 1920, and made in civil suit No. 5 of 1914.

The suit arose under the following circumstances :

Manmad village, now grown to an important railway junction, was held by the Vinchurkar—one of the lesser Mah-ratta chiefs—together with many other villages in saranjam grant from the Peishwa, the then ruler of the country. The last holder of the entire saranjam was the late Sardar Raghunathrao Vinchurkar, commonly known as Annasaheb, who held it from 1826 till 1889, when he died. On his deathbed he adopted as a son the plaintiff Shivdevrao, but the Government refused to recognize the adoption, and in 1892 re-granted half of the saranjam to the late Sardar's brothers and their sons and resumed the other half, which included Manmad village. The adopted son, though thus excluded from any share in the saranjam, would still be entitled to the *private* as opposed

to the *saranjam* property of his adoptive father. Between 1892 and 1913 there were disputes between Government and Shivdevrao Vinchurkar as to certain lands in Manmad (the subject-matter of the present suit which he claimed as his adoptive father's *mirasi* or private property by virtue of a sale-deed of 1755. These are five plots in the village site (described as A to E in the plaint) and six plots of agricultural lands within the village limits but not forming part of the village site, and described as plots F to K in the plaint.

These disputes led to an order by the Commissioner of Revenue C. D. on the 9th April 1913, whereby it was held that the lands in dispute were not covered by the sale deed relied upon but

must have passed into the possession of the Vinchurkars by forfeiture of lands through the Khatedar's (i. e., modern occupancy tenant) family being extinct or through default in the payment of land revenue.

The Commissioner held that on the lapse of the *saranjam* to Government these lands also became the property of Government, who thereupon became entitled to levy not merely the Government revenue assessed thereupon, but the actual ground rent in respect of the plots included in the village sites, the tenants being liable to pay these rents to Government and not to the Vinchurkars; and, further, that in respect of the other plots, i. e., the agricultural lands, Government as owner was entitled to recover from the Vinchurkars not the assessed Government revenue, but the market rent, which was considerably larger, and in default of payment the Vinchurkars were ordered to be evicted.

This order of the Commissioner was in due course given effect to, and Shivdevrao Vinchurkar instituted the present suit for declaring the Commissioner's order illegal and for recovery of possession of the first five plots and an injunction against the threatened eviction in respect of the other six plots, and for mesne profits in respect of both.

In his plaint he based his title primarily on the sale-deed of 1755 above-mentioned, by which the then Patils of the village conveyed half of their rights to the ancestor of the Vinchurkar. He also relied on adverse possession "for over 150 years," and claimed that by virtue of certain admissions at different times on the part of various Government

officials, Government was estopped from disputing the *mirasi* or private rights of the Vinchurkar family. But he alleged as an alternative basis of his title, and apparently in view of the Commissioner's finding, that

even if perchance the Court comes to the conclusion that the right of *mirasi* ownership. . . did not pass to the plaintiff's ancestors under the sale-deed of 1755 A. D., but that the property in suit must have gone into the possession of the plaintiff's ancestors by reason of the extinction of the khatedar's family or by reason of its resumption for arrears of assessment, still no manner of right whatever has accrued or accrues to the defendant in law over the said property. The said property is in law of the absolute personal and *mirasi* ownership and *vahi*vat of the plaintiff and his ancestors.

(Para. 3 of plaint.)

By his written statement the defendant denied all these allegations of fact and submissions of law by the plaintiff, and contended that the lands in suit were held by the plaintiff's ancestors as *saranjam* and all *saranjam* rights, including the right to hold lands that had passed into his possession and enjoyment by the death of the khatedars without heirs or by forfeiture, had lapsed on the death of Annasaheb and had been resumed by Government (except as to one-half not now in question.)

On the question of title by adverse possession and by estoppel, both the District Judge and the High Court held against the plaintiff, and their Lordships see no reason to differ from them.

Of the remaining issues the first was as follows :

Does the plaintiff prove that he (i. e., his ancestors) purchased the suit land by a sale-deed of 1755 A. D. ?

The District Judge held that the construction of the deed in question presented some difficulty, for it is in archaic language, and deals with a state of affairs to which no one now has the key,

but on a review of the whole evidence, including village papers and accounts, he came to the conclusion that the lands sold by that deed did not include the lands in suit, and he found the first issue in the negative.

The High Court accepted this.

Notwithstanding this concurrent finding, some argument was addressed to their lordships to prove that some, though not all, of the lands in suit are, in fact, covered by the sale-deed of 1755. After careful consideration, their lord-

ships see no reason to differ from the finding of both Courts in India on this point.

Issue 2 was to the following effect :

Does the plaintiff prove that his ancestors became owners of the suit lands either through forfeiture or through extinction of the khatedar's line ?

The concurrent finding of both Courts on this issue appears to their lordships to be that the lands in suit originally belonged to khatedars or mirasi tenants, and on their interests coming to an end in the manner mentioned the saranjamdar caused his own name to be put in their place in the khatas or village papers, and assumed possession of those lands.

The only other material issue remaining to be considered is issue 6. viz. :

Was the suit land included in the half of the saranjam resumed by the Government ?

This is intended to raise the question whether as an effect of the resumption, the Government was entitled to oust plaintiff from the possession of those lands.

The answer depends on the legal effect of the finding on issue 2.

Both the Courts below have answered it in the plaintiff's favour, the District Judge, on the ground that he was bound by the decision of the High Court reported in *Gururao v. Secy. of State* (1) (then under appeal to this Board and subsequently reversed), and the High Court on the judgment of this Board in *Secy of State v. Laxmibai* (2), though it reversed the decision in *Gururao v. Secy. of State* (1), had not decided this particular point, with regard to which the High Court was of opinion that decisions of that Court had established the law in the manner contended for on behalf of the plaintiff. One of the learned Judges, Mr. Justice Fawcett, expressed his personal dissent from that view of the law, but considered himself bound by previous decisions of the High Court.

It is necessary, therefore, to consider what are the incidents of a saranjam grant, and how far the same can be gathered from statutes or judicial decisions in the absence of the deed of grant.

But before doing so their lordships think it necessary to deal with two points

(1) [1917] 41 Bom. 408=39 I. C. 65=19 Bom. L. R. 117.

(2) A. I. R., 1923 P. C. 6=47 Bom. 327=50 I. A. 49 (P. C.).

argued by Mr. De Gruyther on the respondent's behalf :

1. That the onus of proof has been wrongly placed on the plaintiff, who, having been dispossessed, was entitled to succeed unless the Government affirmatively proved its own title to the lands in question.

The plaintiff accepted the onus on the issues as they were framed. Evidence was gone into on that basis, and the parties proceeded to trial evidently on the assumption that the plaintiff could derive title only in one or other of the ways mentioned in paras. 2 and 3 of the plaint. But for that, the procedure might have been different in many respects, and it appears to their lordships too late to raise any such question at this stage.

Their lordships would further observe that no basis of title other than those mentioned in paras. 2 and 3 of the plaint has up to the last been suggested on behalf of the plaintiff.

2. The second point was that the village papers kept by the village officials, having entered the name of the Vinchurkar as khatedar in respect of the lands in suit, this must be taken to have been acquiesced in and accepted by the Collector on behalf of the Government, and it amounted in effect to a new agreement for a permanent tenancy, which remained unaffected by the subsequent resumption of the *saranjam*. This is a new case not suggested till the last moment, and even if their lordships were inclined to entertain it (which they are not) it seems to have little foundation in fact. The position of the saranjamdar enabled him to have complete control over the management of the village and the village officials, and there is no reason to assume that those entries, or the papers themselves, were in any way brought to the cognizance of, or acquiesced in, and much less sanctioned by the Collector.

It is no doubt correct to say, as Mr. Justice Shah does, that the fact that the saranjamdar is in a sense a life tenant does not alter the ordinary incidents of a grant by way of *saranjam*.

But what those ordinary incidents are must be ascertained when there is no deed of grant forthcoming, from (a) the evidence, if any, in the case ; (b) from legislative enactments ; and (c) from

judicial decisions. Failing all these, there would be nothing else but general principles of law to apply.

Now we find from Wilson's Glossary that amongst the Mahrattas the term "saranjam" was applied specially to a temporary assignment of revenue from villages or lands for the support of troops or for personal military service, usually for the life of the grantee; also to grants made to persons appointed to civil offices of the State to enable them to maintain their dignity, and to grants for charitable purposes. These were neither transferable nor hereditary, and were held at the pleasure of the Sovereign. They were divided into two classes, viz. (a) grants of revenue only, i. e., of the royal share of the produce of the lands comprised in the grant; and (b) grants of the soil itself. It would seem to follow from the nature of saranjams that whether they were grants of the soil itself or of the revenue only of specified lands, they could not and were not meant to interfere with rights in those lands existing previously to and at the time of the grant. If and so far as there were occupancy tenants on those lands, they would retain their right of possession (whether it can be called ownership or not is immaterial) but subject to paying the assessed land revenue (i. e., royal share of the produce) payable before the grant to the Government and after the grant to the grantee. On principle, the grantee would not, unless specially authorized, be able to convey a title larger than his own. He could not convey a permanent title to any portion of the land, either by sale or by lease. Such sale or lease might be good as against himself but would be void as against the grantor.

In the case of a grant of the soil itself, it has been decided by this Board that, on the grant coming to an end, the Government representing the original grantor is entitled to resume actual possession: *Secretary of State v. Laxmibai* (2). But it is urged that in the case of the other kind of grant, Government can take back only what it granted, viz., the royal share of the produce; in other words assess the land revenue payable in respect of the land, but it cannot interfere with the possession of the grantee. This would be quite consistent with principle, if the grant made the grantee

a charge-holder pure and simple. But if the grant also conveys by implication or otherwise the right to take possession of the land itself under certain circumstances, it is difficult to hold that though the charge might come to an end the possession taken under and by virtue of that charge should still continue, or, as Mr. Justice Fawcett put it, that the incident should survive the grant.

There is no legislative enactment which is applicable in the circumstances of this case. The Saranjam Rules of 1898 do not apply *proprio vigore* as this saranjam was resumed in 1892, and even if they can be held to be merely declaratory of the previous law, they do not throw any light on the question under consideration.

As regards judicial decisions, those with regard to inams do not seem to be necessarily applicable. The word "inam" is sometimes vaguely applied to all grants of revenue-free land, without reference to perpetuity or any specified conditions. But it would be unsafe to apply to a peculiar grant like Mahratta saranjam rules which were held applicable to grants in perpetuity.

Mr. Justice Shah refers to what he calls a "long course of decisions" in Bombay as establishing two propositions. The first is admittedly overruled by the decision of this Board in *Secretary of State v. Laxmibai* (2). His second is that in the case of a saranjam grant of the royal share of the revenue, it is open to the grantee to make the best use of the grant for his own benefit, i. e., to appropriate the lands to his own use, subject to the payment of the royal share of the revenue and to create rights of occupancy in his own favour or in favour of third parties.

On examination it appears that there are only three decisions which directly bear on the point, viz., *Ram Chandra Mantri v. Venkatrao* (3); *Ganpatrav Trimbak Patwardhan v. Ganesh Bajibhat* (4); and *Hari Sadashiv v. Shaik Ajmudin* (5).

In the first of these cases Mr. Justice Melvill said at page 598:

The saranjamdar may deal with all unoccupied lands as may be best for the purposes of revenue and may either cultivate them himself or through tenants.

And it was observed by Batchelor J.,

(3) [1882] 6 Bom. 598.

(4) [1885] 10 Bom. 112.

(5) [1886] 11 Bom. 235.

in *Balvant Ramchandra v. Secretary of State* (6), that since Mr. Justice Melvill's judgment in 1882 the law in Bombay has always been that a grantee of the revenue is entitled to make such profit as he can out of the unoccupied lands.

But this is very far from holding that the right to make such profit survives the grant and continues after the grant has been resumed.

This construction was, however, placed on Mr. Justice Melvill's words quoted above in *Ganpatrav Trim-bak v. Ganesh Bajibhat* (4), where Sargent, C. J., after quoting the passage from Mr. Justice Melvill's judgment in *Ram Chandra Mantri v. Venkatrao* (3), paraphrased it as follows:

Or, in other words, that the saranjamdar may acquire occupancy rights which . . . remain unaffected by the resumption of the saranjam, except as to the assessment thenceforth payable to Government.

These observations were not necessary for the decision of that case, and their Lordships are unable to agree that the language of Mr. Justice Melvill in *Ram-chandra Mantri v. Venkatrao* (3) bears the meaning or has the effect attributed to it by Sargent, C. J.

The same observations would apply to the case in *Hari Sadashiv v. Shaik Ajmudin* (5). The Government was not a party to either of these cases, and the lands in dispute were held on the evidence in both cases to be the private property (sheri lands in the one case and mirasi lands in the other) of the grantee. Their Lordships are therefore unable to hold that there is any long course of decisions in the High Court of Bombay laying down, with regard to saranjams of this nature, the broad rule enunciated by Mr. Justice Shah that the grantee would be entitled to create in his own favour occupancy rights in lands unoccupied at the time the grant was made or held by others then, but forfeited on one ground or another during the subsistence of the grant.

The question whether he could create such rights in favour of third persons by virtue of the powers of management above referred to does not arise in this case, and their Lordships refrain from expressing any opinion upon the point. But their Lordships hold that he could not create such rights in his own favour,

(6) [1908] 82 Bom. 432=10 Bom. L. R. 581.

and that when the saranjam was resumed, the Government became entitled to resume not only the land revenue, but also all the rights and benefits that the grantee had secured by virtue of his grant.

Their Lordships will humbly advise His Majesty that this appeal should be decreed with costs and the plaintiff's suit dismissed with costs in both the Courts in India.

R.K. Appeal decreed.

Solicitors for Appellant—The Solicitor, India Office.

Solicitors for Respondent—T. L. Wilson and Co.

* * A. I. R. 1927 Privy Council 242

[From Lahore: A. I. R. 1927 Lah. 181]

26th July 1927

LORDS SINHA AND BLANESBURGH AND
SIR JOHN WALLIS

Delhi Cloth and General Mills Co., Ltd.—Petitioners.

v.

Income-tax Commissioner, Delhi, and another—Respondents.

* * (a) *Income-tax Act* (1922 amended 1926), S. 66-a (2) and (3)—*Appeal to Privy Council lies only if case is certified as fit by High Court.*

The words "which the High Court certifies to be a fit one for appeal to His Majesty in Council," in sub-S. 2, coupled with the carefully limited referential words to the Civil P. C., in sub-S. (3), suffice to exclude from any right of appeal, cases which fall within the requirements of S. 110 of the Code and the words are operative to confine that right to cases which are certified to be otherwise fit for appeal to His Majesty in Council. The words of qualification, "so far as may be" in sub-S. (3) are apt to confine the statutory right of appeal to the cases described in sub-S. (2): *A. I. R. 1927 Lah. 181, Affirmed.* [P 242, C 2; P 244, C 1]

(b) *Interpretation of Statutes*—*Provisions touching existing rights are not ordinarily retrospective—Existing rights explained.*

While provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. Provisions which, if applied retrospectively, would deprive of their existing finality orders which, when the statute came into force, were final, are provisions which touch existing rights: *Colonial Sugar Refining Co. v. Irving* (1905) A. C. 969, *Rel. on.* [P 244, C 2]

(c) *Income-tax (Amendment) Act* (1926), S. 8—
Scope.

Act is not retrospective. [P 244 C 2]

G. R. Loundes and E. B. Raikes—for
Petitioners.

A. M. Dunne and K. Brown—for Res-
pondents.

Lord Blanesburgh.—These petitions are each of them for special leave to appeal from orders made by the High Court of Judicature at Lahore on references to that Court under S. 66 (2), Indian Income-tax Act, 1922. In each case the sum in dispute exceeds Rs. 10,000. In each the order in question was made before the 1st April 1926, that in the first of the two cases being of date the 12th January 1926, and that in the second having been made on the 6th January 1926. In each case, also, the High Court refused to certify that the case was a fit one for appeal to His Majesty in Council. With these facts for its foundation, an interesting argument was addressed to the Board upon the nature of the statutory appeal in such cases as these, and upon the question whether in the present instances there is any such appeal at all.

The learned Judges of the High Court were of opinion that the petitioners had a right of appeal to His Majesty in Council provided they could, in effect, bring their cases within the requirements of S. 109 (c), Civil P. C., but not otherwise. They dealt with the applications for certificates on that footing, and they dismissed them. Hence the present petitions.

At the hearing before the Board, the view of the High Court was resolutely challenged by the petitioners. It sufficed, it was contended, that the cases should fall within the requirements of S. 110 of the Code: the petitioners' right of appeal was in no way conditional on compliance with the requirements of S. 109 (c). The respondents, on the other hand, supported, as applied to the general case, the view of the High Court, but, contended that, for the petitioners here, there was, for reasons which will appear in the sequel, no statutory right of appeal at all.

These rival contentions raise questions of great general importance. It has seemed to their Lordships to be convenient that they should definitely pronounce upon them.

The legislative history of the subject is a short one. No express provision for appeals to His Majesty in Council from orders of a High Court in India made upon references either under S. 51, Indian Income-Tax Act, 1918, or under S. 66 of the Act of 1922, is to be found in either statute, but until the case of *Radhakrishna Ayyar v. Sundaraswami Iyer* (1), was decided by the Board, it was apparently generally supposed in India that appeals from such orders were regulated by Ss. 109 and 110, Civil P. C., to which reference has already been made. The effect of the judgment in the case cited was, however, definitely to lay it down that from these orders there was, in fact, no statutory right of appeal at all. And such was the position until the 1st April 1926, when the Indian Income-tax (Amendment) Act, 1926, came into force, by S. 8 of which it is provided that immediately after S. 66, Indian Income-tax Act, 1922, a section should be inserted, of which it is convenient to transcribe the first three sub-sections:

66A (1) When any case has been referred to the High Court under S. 66, it shall be heard by a Bench of not less than two Judges of the High Court, and in respect of such case the provisions of S. 98, Civil P. C., 1908, shall, so far as may be, apply, notwithstanding anything contained in the Letters Patent of any High Court established by Letters Patent or in any other law for the time being in force.

(2) An appeal shall lie to His Majesty in Council from any judgment of the High Court delivered on a reference made under S. 66 in any case which the High Court certifies to be a fit one for appeal to His Majesty in Council.

(3) The provisions of the Civil P. C., 1908, relating to appeals to His Majesty in Council shall, so far as may be, apply in the case of appeals under this section in like manner as they apply in the case of appeals from decrees of a High Court.

It is upon these sub-sections that the question now under discussion depends, and as to them it will be noticed that the appeal thereby given is by sub-S. 2 confined to a case which the High Court certifies to be a fit one for appeal to His Majesty in Council.

These words are textually the same as the concluding words of sub-S. (c), S. 109, Civil P. C., and, coupled with the carefully limited referential words to the Civil P. C. in sub-S. 3, suffice, in their Lordships' judgment, to exclude from any right of appeal cases

(1) A. I. R. 1922 P. C. 257=45 Mad. 475=49 I. A. 211.

which fall within the requirements of S. 110 of the Code and are operative to confine that right to cases which are certified to be otherwise fit for appeal to His Majesty in Council. It was conceded in argument that if sub-S. 2 of the section had stood alone, it would be difficult to escape from the construction of it which has just been indicated. It was contended, however, that the reference to the Code in sub-S. 3 was made in terms sufficiently comprehensive to include within the class of appealable cases all that are defined in the provisions incorporated by reference. Their Lordships cannot agree with this contention. The words of qualification, "so far as may be," in sub-S. 3 are, in their judgment, apt to confine the statutory right of appeal to the cases described in sub-S. 2. To this extent, therefore, their Lordships are in agreement with the High Court.

But a further point remains. Is there under this section any appeal at all from an order of the High Court made before the Act of 1926 came into force?

The principle which their Lordships must apply in dealing with this matter has been authoritatively enunciated by the Board in the *Colonial Sugar Refining Co. v. Irving* (2), where it is in effect laid down that, while provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. Their Lordships can have no doubt that provisions which, if applied retrospectively, would deprive of their existing finality orders, which, when the statute came into force, were final, are provisions which touch existing rights. Accordingly, if the section now in question is to apply to orders final at the date when it came into force, it must be clearly so provided. Their Lordships cannot find in the section even an indication to that effect. On the contrary, they think there is a clear suggestion that a judgment of the High Court referred to in sub-S. 2 is one which under sub-S. (1) has been pronounced, by "not

less than two Judges of the High Court," a condition which was not itself operative until the entire section came into force. In their Lordships' judgment, therefore, the petitioners in these cases have no statutory right of appeal to His Majesty in Council. Only by an exercise of the prerogative is either appeal admissible.

Both petitions their Lordships have, from this point of view, carefully considered. They have not forgotten that the circumstances are somewhat special: that the right of appeal introduced by the Act of 1926 is very probably conceded in order to rectify an omission inadvertently made from previous legislation, and is not one thought of for the first time. Even so, however, their Lordships are unable to find in the circumstances of either case sufficient ground for any exercise of the prerogative in favour of the petitioners.

Their Lordships will accordingly humbly advise His Majesty that both petitions should be dismissed and with costs.

D.D. *Petitions dismissed.*

Solicitors for Appellants—*T. L. Wilson & Co.*

Solicitors for Respondents—*The Solicitor, India Office.*

* A. I. R. 1927 Privy Council 244

(From Allahabad)

12th July 1927

LORD BLANESBURGH, SIR JOHN WALLIS
AND SIR LANCELOT SANDERSON.

Suraj Bhan Singh and others—Appellants.

v.

Sah Chain Sukh and others—Respondents.

Privy Council Appeal No. 20 of 1926 :
Allahabad Appeal No 2 of 1924.

* *Hindu Law—Alienation by widow—Very small portion of consideration found not for necessity—Sale was upheld.*

Where out of a total consideration of Rs. 19,000, for sale of her husband's property by a Hindu widow, Rs. 17,000 and odd were found to be for necessity, the sale was upheld: *A. I. R. 1927 P.C., 37 and 121, Appl.* [P O 1]

A. M. Dunne and B. Dube—for Appellants.

G. R. Loundes and W. Wallach—for Respondents.

(2) [1905] A. O. 369=74 L. J. P. O. 77=21
T. L. R. 513=92 L. T. 738.

(The judgment of the Allahabad High Court delivered by Lindsay and Sulaiman, JJ., was as follows.)

The property in dispute in this case consists of a three-biswa odd share in three villages, Kairgarh, Nagla Himmat and Nagla Khayatan, and belonged to one Baldeo Singh who died in the year 1898. According to the pedigree set out in the plaint, Baldeo Singh had a son Bharat Singh, who, it is admitted, predeceased him.

When Baldeo Singh died he was succeeded by his widow, Mt. Phula Kunwar who remained in possession of his estate till her death in January 1912. At the time she died the next heir under the Hindu law was Bhanwar Singh alias Khairati Singh, the son of Baldeo's daughter. He was impleaded in the suit out of which this appeal has arisen as defendant 8.

On the 19th January 1903 Mt. Phula Kunwar sold the property in suit for Rs. 19,000 to three persons: Sah Tejpal, Sah Ram Chandra, and Sah Piaro Lal who are now represented by the defendants 1 to 6.

Plaintiffs 1 to 5 in the suit are sons of Maharaj Singh who was a nephew of Baldeo Singh, and who, it is said, survived Mt. Phula Kunwar by a few days.

These plaintiffs, claiming to be the right heirs to the property along with another brother of theirs named Chandra Bhan Singh (impleaded as defendant 7) have brought this suit for the purpose of avoiding the sale made by Phula Kunwar in 1903. They have sold their interest in the property in dispute to the sixth plaintiff Sah Moji Ram.

The case for the plaintiffs was that Phula Kunwar had exceeded her powers as a female heir and had conveyed away the property without any necessity, and that the transfer so made was as against them altogether null and void. In order to establish their right to maintain the suit in the presence of Bhanwar Singh, Baldeo's daughter's son (defendant 7), they pleaded in para. 6 of the plaint that under a custom prevailing in the clan of Chauhan Thakurs to which Baldeo Singh belonged, daughters and sons are excluded from inheritance. It was further alleged that this custom obtained in Baldeo Singh's family.

In para. 7 of the plaint it was alleged that Bhanwar Singh, defendant 7, was, in consequence of the custom, no heir to Baldeo Singh, and it was further stated that on the 13th October 1916, Bhanwar Singh had executed a document disclaiming any right to inherit, and relinquishing his rights in the property (if he had any) in order to avoid disputes.

The plaintiffs, therefore, claimed to be put into possession of the property by avoidance of the sale, subject to the rights of defendant 7, Chandra Bhan Singh the remaining son of Maharaj Singh, who had not joined as a plaintiff and had not conveyed his interest in the property to the plaintiff 6, Sah Moji Lal. The first six defendants, the representatives of Phula Kunwar's vendees defended the suit on various pleas. We need only notice here that they denied the custom set up in the plaint. They also denied the right of the plaintiffs to maintain the suit; and a further plea was that the sale by Phula Kunwar was justified on the ground of legal necessity and that the property had been sold for its full value. Chandra Bhan Singh, the defendant 7 filed no defence.

Bhanwar Singh, defendant 8, put in a written statement admitting all the facts alleged in the plaint and declaring that he had no rights in the property in suit, which he said, belonged to the plaintiffs. He admitted execution of the deed of relinquishment dated the 13th October 1916, and prayed to be discharged from the suit on the ground that he had no interest in the litigation. The Subordinate Judge came to no finding on the issue raised as to the custom set up by the plaintiffs, considering that in view of what he was deciding on the other issues no such finding was required.

He upheld the right of the plaintiffs to sue on the ground that Bhanwar Singh had renounced his title in their favour by execution of the document of the 13th October 1916. He was of opinion that full value had been paid for the property when it was sold by Phula Kunwar. He further upheld that the representatives of Phula Kunwar, vendees, had succeeded in proving that the debts in lien of which the property was sold were binding to the extent of Rs. 17,378-4-0, and he, therefore, gave the plaintiffs a decree for possession subject to their paying this

sum into Court within three months from the date of the decree.

The defendants have appealed and the main contentions here have been: (1) that the plaintiffs had no right of suit; and (2) that the Court below should have affirmed the sale on the ground that legal necessity had been proved in respect of the entire consideration of Rs. 19,000.

The plaintiffs-respondents have filed cross-objections claiming that they were not liable to pay any of the sums declared by the Subordinate Judge to be binding upon them. They also object to the finding that they were not entitled to mesne profits. (The judgment here discussed other points not material for this report and then discussing about the amount of consideration which was found for necessity proceeded.) We agree accordingly, with the finding of the learned Subordinate Judge that legal necessity for the sale was established to the extent of Rs. 17,378-4-0 and no more.

As to the point raised in the petition by way of cross-objection that the Court below did not deal properly with the plaintiff's claim for mesne profits it is sufficient for us to say that we agree with the Judge's reasons for not making any order in respect of these profits.

One other point only calls for notice. It was argued on behalf of the appellants that in view of the findings the decree is not drawn in proper form. The decree as framed, is one for possession on payment by the plaintiffs within three months of the above-mentioned sum of Rs. 17,378-4-0. In default it is proved that the suit shall stand dismissed with costs. The suggestion is that having regard to the small amount, viz. Rs. 1,600 in respect of which it was found that legal necessity had not been proved, and in view of the proportion this sum bears to the total amount of the consideration, it would have been proper to confirm the sale in toto subject to payment to the plaintiffs of the Rs. 1600 odd. But we are satisfied that the decree is in proper form and we should not have interfered with it on that ground. It may be that in cases where peculiar equities arise, it would be expedient to follow the course suggested, but we are satisfied that there are no considerations of this nature to be taken into account here.

For the reasons already given we hold that the appeal succeeds and it is decreed accordingly. The suit of the plaintiffs is dismissed with costs to defendants 1 to 6 in both Courts, including in this Court fees on the higher scale.

The cross-objections fail and are dismissed with costs which will also include fees on the higher scale.

(The judgment of the Privy Council was as follows).

Lord Blanesburgh.—It appearing to the Board that this case comes within the principles laid down by the Board in the cases of *Sri Krishn Das v. Nathu Ram* (1) and *Niamat Rai v. Din Dayal* (2), their Lordships, without taking into consideration the facts of the case, will humbly advise His Majesty that this appeal should be dismissed with costs.

D. D. *Appeal dismissed.*

Solicitors for Appellants.—*H. S. L. Polak.*

Solicitors for Respondents—*Douglae Grant & Dold.*

(1) A. I. R. 1927 P. C. 37 = 49 All. 149 = 54 I. A. 79.

(2) A. I. R. 1927 P. C. 121 = 54 I. A. 211.

* A. I. R. 1927 Privy Council 246

(From Allahabad)

28th July 1927

LORDS SHAW AND SINHA AND SIR JOHN WALLIS.

Gauri Shankar and others—Appellants.
v.

Jiwan Singh and others—Respondents.
Privy Council Appeal No. 64 of 1926,
Allahabad Appeal No. 14 of 1925.

* (a) *Hindu Law—Alienation—Practice of settling cases by accounting not approved—Practice (All. H. C.).*

The practice of the Allahabad High Court of investigating and settling the cases of alienation of family property upon the principles of accounting imperils transactions of sale which, in their real essence and substance, are sales made for family necessity. [P 242 C 1]

* (b) *Hindu Law—Alienation—Necessity—Small part of consideration not proved for necessity—Sale should be upheld.*

A sale of joint property will not be set aside merely because a part of the proceeds is not proved to have been applied to purposes of necessity. The real question that has to be considered is this: Whether the sale itself was justified

by necessity. If the purchaser has acted honestly, if the existence of a family necessity for sale is made out, and the price is not unreasonably low, he (the purchaser) is not bound to account for the application of the price: *A. I. R. 1927 P. C. 37, Ref.* [P 248 C 1]

W. Wallach—for Appellants.

Lord Shaw.—This appeal concerns property which is undoubtedly family property. It was sold for family necessity, so alleged, at the price of Rs. 4,000. There is no allegation made upon the record, or suggested in any respect, that the property was sold for the payment of any debts for immoral purposes. The only question is as to family necessity.

A certain practice appears to have crept up in the Allahabad High Court of investigating and settling these cases upon the principles of accounting. If, upon a strict accounting, it is found that, although it be completely established that by far the most substantial part of the consideration was for family necessity, yet if a certain balance of the price remains unaccounted for, or insufficiently proved, then by that result the parties' interests are to be judged, and the sale is set aside, conditionally upon the repayment by the vendor or his representatives of the substantial part referred to.

It is manifest that this practice imperils transactions of sale which, in their real essence and substance, are sales made for family necessity.

The present case is interesting as illustrative of the point. It may be that in all cases of family necessity sums have been expended which, after a lapse of years, cannot be verified by entries in books or the like. It is, therefore, important to notice that in the present case the transaction of sale stood unchallenged for upwards of 11 years. The sale took place on the 26th February 1910, and it was not until the 11th July 1921, that this sale was put in challenge and the Court was asked to declare it void as not having been for family necessity.

In the course of the investigation, the case as to family necessity with regard to the major portion of the accounts was completely satisfied. Both Courts held that payment was made to extinguish a prior mortgage bond, and the amount due thereunder was Rs. 3,135. Both Courts further agree in holding that the Rs. 65 was paid to the vendors before the execution of the sale-deed.

The Judge who tried the case stated his conclusion upon the largest item thus:

It is, therefore, clear that the bond of the 17th April 1906, was executed by Meharban Singh and his sons for family necessity.

He also makes the same clear statement with regard to the Rs. 65. As to the third item of Rs. 800: he holds it to be proved by the Auraiya Treasury, and its official who was called in, that sums amounting to a total of Rs. 535 were paid by the vendors into the Treasury before the 15th August 1910. The small balance of between two and three hundred rupees, the learned Judge says, has not been very well accounted for; but, in view of the fact that a large portion of the consideration for the sale has been proved to have been required for legal necessity, he has no hesitation in holding that the entire consideration for the sale was such necessity. He adds this pregnant remark:

It is also to be considered that the suit has been brought long after the execution of the sale deed, when it is not easy for the vendees to adduce strong and perfectly satisfactory evidence about each item of the sale consideration.

These views of the Subordinate Judge have the approval of their Lordships.

The learned Judges of the High Court, however, in accordance with the practice to which allusion has been made, state that on their estimate of the consideration for sale, they do not reach the conclusion that the entire amount of the Rs. 4,000 is proved to have been justified by necessity. They admit the bond and the item of Rs. 3,135 thereunder. They admit the payment of Rs. 65. They further give credit for the payment of certain Government and other dues exigible upon the property; but they consider that there is an unaccounted balance of Rs. 500. Having reached that amount, the learned Judges of the High Court then pronounce the sale invalid, subject to the condition of payment to the appellants of the items proved.

Their Lordships think this practice to be erroneous. It is to be noted that a judgment which finally summed up the entire law on this subject was pronounced by this Board on the 10th December 1926, in the case of *Krishn Das v. Nathu Ram* (1). The judgment of the High Court had been given about twenty months sooner, namely on the 30th March 1925. In their Lordships' view,

(1) *A. I. R. 1927 P. C. 37 = 49 All. 149 = 51 I.A.*

had the *Krishn Das* judgment been pronounced prior to the judgment of the High Court that Court would have, in view of it, reached a different conclusion. In that case a considerable body of authority was considered by the Board; and the result was in substance that a sale of joint property will not be set aside merely because a part of the proceeds is not proved to have been applied to purposes of necessity. The real question that has to be considered is this: Whether the sale itself was justified by necessity. Their Lordships cannot go back upon that decision. If the purchaser has acted honestly, if the existence of a family necessity for sale is made out, and the price is not unreasonably low, he (the purchaser) is not bound to account for the application of the price. They, however, take the case, even upon the footing, which might well be challenged, that Rs. 500 out of the price of Rs. 4,000 had not been fully accounted for. Granted that it was so, then the balance of Rs. 3,500 out of Rs. 4,000 is surely a justification of sale for a family necessity proved up to that amount.

In those circumstances their Lordships will humbly advise His Majesty that this appeal should be sustained, the decrees of the High Court set aside with costs, and that of the Subordinate Court restored. The first respondent (the plaintiff) will pay the costs of the appeal.

D.D. Decree set aside.

Solicitors for Appellants—H. S. L. Poial.

* * A. I. R. 1927 Privy Council 248

(From Oudh : A. I. R. 1925 Oudh 465.)

18th October 1927.

LORDS DARLING, WARRINGTON OF CLYFFE, MR. JUSTICE DUFF AND SIR LANCELOT SANDERSON.

Shiam Sundar Singh—Appellant.

v.

Jagannath Singh—Respondent.

Privy Council Appeal No. 6 of 1927 ; Oudh Appeals Nos. 2 and 3 of 1925.

* * Succession Act. (1865), S. 54—*Father making will and calling upon sons to sign it as token of consent and to avoid quarrels among*

themselves—Sons so signing do not sign as attesting witnesses.

A testator devised his property to his sons in a certain manner and added in the will "I have executed this will with the consent of all my sons and have got them to sign it as witnesses with this very purpose so that this will may be acted upon fully and they may not quarrel among themselves after my demise." The will was signed by the testator as "executant" and below the testator's signature, after the signature of one of the witnesses, there were the signatures of his sons, and below them the signatures of three other persons who signed as attesting witnesses. The witnesses agreed that while the testator invited others to sign as attesting witnesses, he addressed no such invitation to his sons, but asked them explicitly to sign for the special purpose of expressing their consent, with the view of avoiding dissensions in the future.

Held : that the signatures of the sons were openly and palpably, with the knowledge of all present, the act of expressing consent, and nothing else, and the signers were not attesting witnesses within the meaning of S. 54 Succession Act : A. I. R. 1925 Oudh 465, Affirmed. [P 249, C 2]

L. DeGruyther and *B. Dube*—for Appellant.

A. M. Dunne and *S. Hyam*—for Respondent.

Mr. Justice Duff.—This is a consolidated appeal from two decrees, both of the 25th November 1924, of the Court of the Judicial Commissioner of Oudh at Lucknow, which were pronounced in an appeal from the Subordinate Judge of Partabgarh. The question raised by the appeal is whether certain legacies in a will of the late Drigbijai Singh, a taluqdar of Athgawan, in the district of Partabgarh, are valid, and the answer to this question must be governed by the determination of the issue, which was the real issue in the Courts below, whether or not the legatees entitled to the benefit of these legacies, if valid, signed the will as attesting witnesses. The Court of the Judicial Commissioner held, affirming the decision of the Subordinate Judge, that this issue must be determined in favour of the respondent.

The testator, by his will, appointed his oldest son, Lal Bahadur Singh, as taluqdar after him, and gave to each of his three younger sons, Jagannath Singh, Ran Bahadur Singh, and Jang Bahadur Singh, certain villages out of the taluqa, to be held absolutely with heritable and transferable rights as under-proprietors if and when they or any of them wished to separate from their oldest brother but

so long as they live in union among themselves with the taluqdar,

the taluqa was to remain undivided, and the income therefrom was to be "spent on the whole family," after paying Government and village dues.

The testator also directed the division of his moveable property in case of a separation, and by para. 8 he declared,

I have executed this will with the consent of all my sons and have got them to sign it as witnesses with this very purpose so that this will may be acted upon fully and they may not quarrel among themselves after my demise.

As to the genuineness of the will there is no dispute. Admittedly, also, disregarding the signatures of the testator's four sons, the execution of the will is attested by a sufficient number of attesting witnesses, in conformity with the law in force in the Province of Oudh.

As would appear from an inspection of the translation of the will, which is the plaintiff's Ex. 1, as reproduced in the record, it was signed by the testator as "executant," and below the testator's signature, after the signature of one of the witnesses, who, it is not disputed, was an attesting witness, there are the signatures of his four sons, and below, them, the signatures of three other persons who also admittedly signed as attesting witnesses. In the margin of the left of these signatures, and just above the signature of the first attesting witness, appears the word "Witnesses." The appellant, who is the son of the eldest son of the testator, on the strength of a passage in the judgment of the Subordinate Judge, contended that in the original will the word "Witness" appears opposite each of the signatures below the testator's, including those of the sons. As in their Lordship's opinion it is immaterial, for the purpose of deciding the question before them, whether or not this was the form of the original document, it may be assumed that the appellant's contention upon this point is well founded.

The will is dated the 17th December 1886, and the testator died in February 1889. In May 1889, the name of the eldest son, Lal Bahadur Singh was, pursuant to the dispositions of the will, inserted in the mutation register, in place of that of the testator. The eldest son having died in May 1912, a joint application was made in the following July by the appellant and his

three uncles (including the two respondents) in the Tahsildar's Court for mutation of names and the substitution of the appellant's name for that of his father. Mutation was duly effected in conformity with this application.

Down to the death of Lal Bahadur Singh, his three younger brothers had lived in union with him, and after his death these three brothers, uncles of the appellant, continued to live with the appellant in joint family until the year 1914. In July of that year the youngest son of the testator decided to separate from the joint family, and an application by him to the Tahsildar's Court for the substitution in the register of his name in lieu of that of the appellant, in respect of the villages bequeathed to him under the will, was not contested by the appellant, and accordingly was granted.

In June 1921, the respondents having decided to separate from the joint family, applications were filed by them, requesting mutation of their names in respect of the villages to which they were severally entitled under the terms of the will. The appellant having raised the objection that the applicants ought first to establish their title by a decree of the civil Court, the applications were dismissed; and the respondents then, in May 1922, instituted the suits out of which this appeal arises. The Subordinate Judge held that the testimony of the three surviving sons of the testator as to the circumstances connected with the execution of the will must be accepted as credible testimony.

The effect of this testimony, as the learned Judge states it, was that the testator, their father, had summoned his four sons to his presence, and, having explained that he had made a will leaving his property to them, asked them to attach their signatures to the will, not as attesting witnesses, but in token of their consent with a view to avoiding disputes after his death; and that they attached their signatures, pursuant to this request. The Subordinate Judge accordingly found, and with him the appeal Court agreed, that the sons did not sign the will as attesting witnesses.

Before their Lordships' Board, counsel for the appellant admitted that the oral testimony narrating what occurred at the time of the execution of the will was admissible in point of law, and, indeed, as will be seen, upon it his substantive con-

tention was founded; nor did he argue that there was any ground upon which the appellant could ask for a reversal of the concurrent findings of the Indian Courts as to the credibility of that testimony. His contention was that, although the position of the signatures created only a presumption that they had been attached by the legatees as attesting witnesses, which presumption might be rebutted by parole evidence as to what actually occurred, still since the signatures were by reason of their position *ex facie* signatures of attesting witnesses, that fact, when coupled with the fact disclosed by the oral evidence, that they were placed there in compliance with the testator's request, was sufficient to constitute the attaching of the signatures an attestation in point of law; and that consequently all questions of intention, whether of the testator or of the persons who signed their names, were without relevancy.

As touching the effect of the evidence adduced on behalf of the respondents concerning what actually occurred at the execution of the will, their Lordships have no hesitation in concurring in the view of all the Courts in India; nor can there be, in their opinion, any doubt as to the character of the acts of the testator's sons in placing their signatures upon the document, when the terms of the will itself and the facts disclosed by that evidence are taken into account. The testator himself, by para. 8, which is quoted above, had declared his intention; that paragraph, it is true, is not worded with the precision that might have been desired, but it would be a strange thing to give effect to it in such a way as to frustrate the obvious purpose of the testator in making it part of his will.

Its manifest object was to secure the co-operation of his sons in carrying out the dispositions of the will, and to do that by inserting in the will a formal declaration that his sons, by appending their signatures thereto, had concurred in those dispositions. By reading the clause as declaring that the sons had signed the will as attesting witnesses, one would ascribe to it a meaning according to which it would not only defeat the object of the clause itself, but nullify the distribution of his property which the testator was seeking to bring about in making his will. The more reasonable and natural reading would appear to be that the sons had

attached their signatures as concurring in the declaration contained in the paragraph; and this latter construction (under which this particular declaration would take effect, together with the will as a whole) seems to be enjoined upon the Courts by S. 71, Succession Act.

The issue as to the character of the acts of the respondents does not for its determination depend upon any conclusion touching the nature of an undisclosed purpose or intention. The witnesses agree that, while the testator invited others to sign as attesting witnesses, he addressed no such invitation to the sons, but asked them explicitly to sign for the special purpose of expressing their consent, with the view of avoiding dissensions in the future. The evidence, once it is accepted, shows that the act of each of them was, openly and palpably, with the knowledge of all present, the act of expressing consent, and nothing else. Their Lordships concur in the view of all the Courts below that in such circumstances the signers were not attesting witnesses within the meaning of S. 54, Succession Act. Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed with costs.

D.D. *Appeal dismissed.*

Solicitors for Appellant—*S. L. Polak.*

Solicitors for Respondent—*Barrow Rogers & Nevil.*

* A. I. R. 1927 Privy Council 250

(From Patna : A. I. R. 1925 Patna 421)

18th October 1927

VISCOUNT DUNEDIN, LORDS SHAW AND SINHA, AND SIR LANCELOT SANDERSON.

Rani Chattra Kumari Devi — Appellant.

v.

W. W. Broucke — Respondent.

Privy Council Appeal No. 2 of 1926,
Patna Appeal No. 2 of 1925.

* (a) Words — *Malguzari* means revenue — *Bengal Tenancy Act, S. 74.*

The word "*malguzari*" ordinarily means revenue, and not rent, much less actual rent: **A. I. R. 1925 Pat. 421, Reversed.** [P 251 C 2]

(b) *Bengal Tenancy Act, S. 74*—Annual rental agreed to be paid in *kabuliyat* must be paid.

A lessee is bound to pay the rent mentioned in his *kabuliyat* as the annual rental comprising

road cess, embankment cess, etc., and cannot evade this liability because the raiyats may not or do not pay him what they used to pay to the lessor: 16 I. A. 152, Dist. [P 252 C 1]

(c) *Bengal Tenancy Act*, S. 74—"Actual rent," meaning explained.

The words "actual rent" in S. 74, cannot be taken to mean either a fair and equitable rent or rent at customary or pargana rates. [P 251 C 2]

G. R. Lowndes and E. B. Raikes—for Appellant.

L. De Gruyther and B. Dube—for Respondent.

Lord Sinha.—The question in this case turns on the construction of a lease, dated 22nd May 1911, of 36 villages of the Ramnagar Raj in the province of Behar and Orissa, granted by the Rajah to a Mr. Broucke.

The material part of the lease is stated in the judgment of the Chief Justice of Patna as follows:

I have let out 16 annas of the following 36 villages as per boundaries given below... at a consolidated annual jama of Rs. 15,581-5-0, being the *malguzari*, road and embankment cesses, dues of priests (*mahal uprohiti*) and expenses for obtaining acquittance receipts (*farag karach*), etc., in addition to 515 maunds of paddy specified below, payable annually at a uniform rate under a *thika patta*, the term whereof is given below and on receipt of a *kabuliyat* to Mr. W. J. Broucke.

At the end of the document is a schedule giving a list of the 36 mauzas and stating in the case of each mauza the total annual jama and details of how it is made up. One instance will suffice. The first mauza is Thath Mitia. The particulars thereunder show, first of all, that the term is for 15 years from 1319 to 1333 F. Then follows a list of payments in respect of that mauza as follows:

	Rs.	as.	p.
Malguzari	673	2	0
Road cess	40	8	0
Embankment cess	10	2	0
Costs of acquittance	24	4	0
Dasahara and Chait Nawmi			
Farmish	12	0	0
Tika, Bheti, Guru Bheti	5	0	0
Batchhapi, Jangla-isim-			
navisi	7	0	0
Katiari	4	0	0
Dewani Dastur	24	14	0
Mahal Uprohiti	5	0	0
Total	805	14	0

Paddy 35 maunds.

The total of Rs. 805-14-0 thus arrived at is then treated as the *jama eksala* (annual rent), and is divided into four kists of Rs. 201-7-6 payable in Asin, Pous, Chait and Jeyth.

The word "*malguzari*," translated as rent in the High Court record, ordinarily means revenue, and is so rendered in Wilson's Glossary. The Chief Justice of Patna was of opinion that the last eight terms of the list above had been collected as *abwabs* from the raiyats long before the lease was executed and were regarded as having the sanction of custom, and he held (Foster, J., concurring) that on a proper construction of the lease Broucke undertook to pay them as *abwabs* under the different denominations as set out in the said schedule and as indicated in the body of the lease, and not as part of the rent, which the Chief Justice took to be the meaning of "*malguzari*" (the first item). In that view the High Court held that under S. 74, *Bengal Tenancy Act*, the lessor was not entitled to recover the amounts covered by the items 3 to 10 of the list, as being *abwabs* in addition to the rent payable under the lease.

S. 74, *Bengal Tenancy Act*, 1885, enacts that

all impositions upon tenants under the denomination of *abwab*, *mathat* or other like appellations in addition to the actual rent shall be illegal, and all stipulations and reservations for the payment of such shall be void.

That section has a long legislative history behind it from 1791 to 1885, which was referred to at the Bar, but to which it is unnecessary to refer further than to state that the object of the whole series of enactments from the Regulations of 1791 to Act 8 of 1885 was to prevent exactions from tenants beyond the rent specified in their *patta*, when there was one, and if there was no written engagement, beyond what was the rent actually payable, whether by verbal agreement or by virtue of custom.

There being a written engagement or lease in this case (the *patta* and *kabuliyat*) the only question is whether the actual rent payable by Broucke as tenant to the Rajah as his landlord is what that lease calls the "*consolidated annual jama*" of Rs. 15,581-5-0 plus 515 maunds of paddy, as the Subordinate Judge held, or only a portion thereof, as the High Court held.

Their Lordships are unable to endorse the view taken by the High Court. *Malguzari*, which is the first of the items composing the total yearly *jama* for each village, cannot be rendered as rent, much less as actual rent; nor is there any evidence to show that the amount of the

malguzari was the actual rent, as distinguished from abwabs, paid by the cultivating raiyats of the village. The only distinction apparent on the face of the lease is between cash rent and produce rent. So far as the former is concerned, it is impossible to take the first item as being actual rent and the rest as abwabs when they are all included in the total, which is expressly stated to be the annual rental payable in four equal kists or instalments specified in figures. It is also to be noticed that the execution-clause of the patta signed by the Rajah, is as follows:

Executed this jika-patta for a term of 15 years in respect of 34 villages and of 17 years in respect of two villages in all 36 villages at an annual jama of Rs. 15,581-5-0 and 515 maunds of fine paddy to be realized from year to year.

Similarly the execution clause of the kabuliyat signed by Broucke is as follows:

Kabuliyat given by me on jama rupees fifteen thousand and five hundred and eighty-one five annas only.

Their Lordships agree with the Subordinate Judge that Broucke was bound under his engagement to pay the rent mentioned therein as the annual rental, and cannot evade this liability because the raiyats may not or do not pay him what they used to pay to the Rajah. The question as to what each raiyat was or is liable to pay as his rent is not before their Lordships, and they do not express any opinion upon it.

A large number of cases decided by the Calcutta and Patna High Courts were referred to in the judgments and cited at the Bar. Their Lordships do not consider it necessary to refer to them beyond expressing their agreement in the view that in each case it has to be ascertained whether the sum claimed is really part of the rent agreed upon to be paid as consideration for the lease.

The case of *Tiluckdari Singh v. Chulhan Mahton* (1) was also referred to. In that case there was an old tenancy without any written contract. But the money claimed was described in the plaint itself as old usual abwabs, and the zamindar's books of account produced in the case showed that on the face of those documents the payments made by the tenant were distinguished as (1) rent and (2) abwabs, i. e., so much for rent, and so much for abwabs. The latter were claimed on the ground that they were pay-

able by custom and had been, in fact, paid for a long time without objection. It was held that long use or custom could not validate abwabs as an addition to the rent.

A somewhat novel argument was advanced on behalf of the respondent, viz. that the words "actual rent" in S. 74 Bengal Tenancy Act were equivalent to the assul jama of the old Regulations, and that any stipulation to pay a rent which, in fact, exceeded what was the assul jama would be illegal to the extent of such excess. This would raise an issue of fact as to what was the assul jama of the 36 villages—the subject-matter of the lease. No such issue was raised in the Courts of India, and, indeed, in no reported case does any such question appear ever to have been raised. Their Lordships would moreover point out that the words "actual rent" in S. 74 cannot be taken to mean either a fair and equitable rent or rent at customary or pergana rates.

In their Lordships' opinion Broucke's actual rent under his lease is the sum of Rs. 15,581-5-0 in cash and 515 maunds of fine paddy, as found by the first Court, and their Lordships will, therefore, humbly advise His Majesty that the judgment of the High Court should be reversed and the judgment of the Subordinate Judge restored, with costs of this appeal and of both Courts in India.

D.D.

Appeal allowed.

Solicitors for Appellant—*Watkins & Hunter.*

Solicitors for Respondent—*W. W. Bor & Co.*

* A. I. R. 1927 Privy Council 252

(From Rangoon : A. I. R. 1925 Rang. 108).

28th October 1927

LORDS SHAW AND SINHA AND
SIR JOHN WALLIS

V. P. R. V. Chockalingam Chetty—Appellant.

v.

Seethai Ache and others—Respondents.
Privy Council Appeal No. 109 of 1926.

* (a) *Transfer of Property Act, S. 6—Property sold by insolvent prior to insolvency and in possession of the purchaser—Sale of such property by Official Assignee is in substance a sale of right to litigate—Provincial Insolvency Act, (1920), S. 59.*

Sales by an Official Assignee of lands in possession of alienees from an insolvent as being

(1) [1890] 17 Cal. 181=16 I. A. 152 (P. C.)

part of the insolvent's estate are in substance, if not in form, nothing more than sales of the right to litigate and assuming that they do not come within the prohibition in the Transfer of Property Act against the transfer of a mere right to sue, they are open to the same objections and are strongly to be deprecated. [P 254 C 2]

* (b) Civil P. C., S. 11 — Suit against several defendants—Other defendants deriving title from first defendant — Suit dismissed against all—First defendant not joined in appeal—Decision of trial Court is *res judicata* as between plaintiff and other defendants also.

Plaintiff sued the first defendant and purchasers through him for setting aside a sale in favour of first defendant. The sale-deed was held valid as between first defendant and plaintiff and the suit was dismissed. In appeal plaintiff joined the subsequent purchasers as respondents but not the defendant 1.

Held: that the finding as to validity of sale deed was *res judicata* as between plaintiff and defendant 1 and also as against the subsequent purchasers. [P 255 C 2]

* (c) Civil P. C., O. 1, R. 10 (2)—Rights of party added under R. 10 (2) are safeguarded by Limitation Act, S. 22.

When parties are added by the Court after the institution of the suit under R. 10 (2), S. 22, Limitation Act, provides that the date when they are added is to be deemed to be the date of the institution of suit so far as they are concerned for purposes of limitation and the rights which they may have acquired under the Limitation Act are therefore sufficiently safeguarded. [P 255 C 2]

* (d) Civil P. C., O. 41, R. 20—Suit dismissed—A defendant not joined in appeal against other defendants is not "interested in the result of the appeal."

The addition of a respondent whom the appellant has not made a party to the appeal is expressly dealt with in R. 20. The Rule empowers the Court to make such party a respondent when it appears to the Court that he is interested in the result of the appeal. [P 255 C 2]

A defendant against whom a suit has been dismissed and as against whom the right of appeal has become barred, cannot be deemed to be interested in the result of the appeal filed by the plaintiff against the other defendants. It is for the plaintiff appellant who applies to the Court to exercise its powers under this Rule to show what is the nature of the interest of such defendant. [P 255 C 1]

* (e) Civil P. C., O. 41, R. 33—Plaintiff's suit dismissed—Plaintiff appealing but joining some defendants only as respondents—Refusal of appellate Court to join the remaining defendants as parties after limitation was held proper.

The plaintiff whose suit had been dismissed against all the defendants failed to appeal against the decree in so far as it affected some of them and allowed the appeal as against them to become barred. The appellate Court in the exercise of its discretion refused to take action under the Rule so as to deprive these defendants of the very valuable right which they had acquired in consequence of the

plaintiff's failure to appeal against the decree in so far as it affected them.

Held: that assuming that under this rule the Court in a proper case might add a defendant as respondent for the purpose of passing a decree against him, there is no sufficient reason for interfering with the refusal of the appellate Court to do so in such a case. [P 256 C 2]

G. R. Lowndes and M. R. Jardine—for Appellants.

A. M. Dunne and E. B. Raikes—for Respondents.

Sir John Wallis.—The point for decision in these appeals from the High Court at Rangoon is a very short one, but there is one other matter dealt with by the trial Judge to which their Lordships desire to refer in the first place—the transaction by which the plaintiff acquired the right to sue for these and other properties in Burma, now valued by him at three lakhs of rupees, from an Official Assignee in Insolvency in another province for the trifling sum of Rs. 580, which could be of no real advantage to the insolvent estate, having regard to the extent of the liabilities.

The lands in Burma, which are the subject of these two consolidated suits in the District Court of Pegu, were acquired by a joint Hindu family of Nattukottai Chetties, a money-lending community residing with their families in what is now the Ramnad District in the south-east of the Madras Presidency, and carrying on business by their agents in other parts of India, Burma, the Straits Settlements and elsewhere. The family was known in Burma as the K. P. firm, these being the distinctive initials prefixed to all their business signatures according to the practice of the community.

In 1908 K. P. Ramanathan Chetty, a young man who had recently succeeded his father as managing member of the family, finding that the Burma agency was in difficulties, got the other members of the joint family to join with him in executing a deed of trust by which they transferred the properties mentioned in the schedule to the deed to a trustee for the benefit of their creditors. The trustee was empowered, among other things, to sell the scheduled properties and invest purchasers with full proprietary rights therein, but was to act in certain matters with the consent of another person described in the deed as a "co-adjutor."

In 1911 the first defendant's firm, who held two decrees against the K. P. firm for over Rs. 72,000, were pressing for payment, and it was arranged that certain properties in the Pegu District, included in the trust deed, should be transferred to them in satisfaction of their claim. A deed of transfer was accordingly executed on the 1st December 1911, in Burma by the duly authorised agents of the trustee under the deed. and K. P. Ramanathan, the managing member of the family.

Satisfaction was duly entered up, and the first defendant took and remained in possession without any question being raised by anyone until some six years later the present plaintiff, V. P. R. V. Chockalingham Chetty, a member of the same community as the K. P. family, who was employed in Rangoon as the agent of another firm, obtained a transfer from the Bank of Bengal of a decree against the K. P. firm for Rs. 90,000, in consideration, the District Judge states, of a payment of Rs. 2,500 and proceeded to attach as the properties of the judgment-debtors the lands which had been conveyed to and were in possession of defendant 1. Finding however, that the attachment proceedings must prove infructuous owing to the fact that the two senior members of the K. P. family had been adjudged insolvents on their own petition in January 1918, in the Court of the District Judge of Ramnad at Madura, the plaintiff went over from Burma to Madura, and on the 19th October 1919, presented a petition to the Official Assignee at Madura, alleging that the properties mentioned in a list annexed to the petition, containing some 75 items, had either been sold benami for the benefit of the insolvent or obtained in the name of his agent or agents with the same object, and praying that they should be sold by public auction, as there were numerous persons prepared to bid, and in case no one appeared the petitioner was prepared to purchase them himself.

The affidavit filed in support of the petition has not been exhibited, but the petition itself contains no mention of the point chiefly relied on in the suits, that the sale to the first defendant was not in accordance with the trust deed. It was opposed by the first insolvent, who stated that he had no personal knowledge of the transactions of his agents in Burma, and prayed for further enquiry in order that the truth might be ascertained. The next

thing that appears is that in December 1919, the Official Assignee advertised the properties for sale as being part of the insolvents' estate, and on the 26th January 1920, there being no other bidders, the plaintiff became the purchaser for Rs. 580 of lands which he stated in his evidence to be worth three lakhs of rupees, the lands now in suit being valued at Rs. 40,000, and the remainder, for which he proposed to institute other suits, at Rs. 260,000.

The District Judge found that the plaintiff's allegation that the sales in question in these suits were benami for the K. P. family was made recklessly and without any foundation, and described his conduct in this matter as most astounding and repugnant. He also criticized the Official Assignee for not making further inquiry as to whether the insolvents had properties in Burma in the names of their agents and inferred from the insignificant price which the Official Assignee accepted that he attached very little weight to the plaintiff's case that these valuable properties still formed part of the insolvent's estate. It seems difficult to resist this inference; but, however this may be, their Lordships desire to observe generally that it forms no part of the Official Assignee's duties as an officer of the Court charged with the realisation of insolvent estates either himself to prefer frivolous claims unsupported by reliable evidence or to transfer them to others and thus promote unnecessary and useless litigation. Further, sales by an Official Assignee of lands in possession of alienees from an insolvent are, in substance if not in form, nothing more than sales of the right to litigate, and, assuming that they do not come within the prohibition in the Transfer of Property Act against the transfer of a mere right to sue—which has not been contended—they are open to the same objections and in their Lordships' opinion are strongly to be deprecated. In the present case, as already pointed out, there was not even any corresponding advantage to the insolvent estate.

Having obtained the transfer, the plaintiff proceeded to file two suits in the District Court of Pegu, which were tried together, against the first defendant and those claiming through him, in which he not only set up the benami character of the transactions, but also contended that

the sale to the first defendant was invalid as not in accordance with the provisions of the trust deed.

The plaintiff in the first suit alleged that the sale to the first defendant was invalid and inoperative in law; that the sale by the first defendant to the second defendant, the E. N. M. K. firm, on the 20th December 1919, was benami for the K. P. firm, which had been adjudged insolvent; and that the sale of the 1st April 1920, by the second defendant to P. R. N. Nadesan Chetty, represented by the third and fourth defendants, was also benami for the K. P. firm; and that the sales by Nadesan to defendants five to eleven, the defendants in possession, were made fraudulently and collusively with a view to defeating the plaintiff's claim, and were invalid and inoperative. The plaintiff in the second suit was in similar terms and challenged the transfers made to the first defendant and by the first defendant to the second defendant, Singaram Chetty, the defendant in possession. The District Judge rejected all the plaintiff's contentions and dismissed both suits, holding, as already stated, on the admissions and the plaintiff's own evidence, that the allegation that the sales were benami was made by the plaintiff recklessly and without any foundation.

The plaintiff filed appeals from these decrees to the High Court at Rangoon, but did not make the defendants 1 and 2, in the first suit or the defendant 1, in the second suit, parties to the appeals.

The learned Judges state in their judgment that when the appeals came on for argument it was pointed out that the foundation of all title of the defendants was the sale deed to the first defendant; that the decrees of the lower Court declared the sale deed to be perfectly valid as between the plaintiff and the defendant 1; that owing to the failure to make the defendant 1, a respondent, there was no appeal from this finding, which had consequently become *res judicata* as between the plaintiff and the first defendant, and must also be regarded as *res judicata* against the respondents, who claimed through the first defendant, or, in other words, as it was put by the learned Judges at the end of the judgment, the finding that the sale to the first defendant was good carried with it

a finding that it was also good as between the plaintiff and the purchasers from the first defendant.

As regards this question, their Lordships agree with the learned Judges of the High Court that the plaintiff cannot be allowed in these appeals to question the validity of the sale to the first defendant or to set up in the first suit the benami character of the purchase by the E. N. M. K. firm from the first defendant so long as the findings in favour of the first defendant and the E. N. M. K. firm stand, and are, therefore, of opinion that as regards this part of the case the plaintiff must fail unless the first defendant and the E. N. M. K. firm are made parties to the appeal. The purchase from the E. N. M. K. firm and the subsequent purchases in the first suit and the purchase from the first defendant in the second suit might stand on a different footing, were there any evidence worthy of the name to show that they were made benami for the K. P. firm because the first defendant and the E. N. M. K. firm would not be necessary parties as regards these issues, but this contention was not raised either in the Court below or before their Lordships, and may, therefore, be disregarded.

As regards the rest of the case, owing to the plaintiff's failure to make these defendants respondents within the time limited for filing an appeal, these appeals, so far as they are concerned, are *prima facie* barred by limitation, and they are entitled to hold the decrees in their favour, which, as pointed out by their Lordships in a very recent case, is a substantive right of a very valuable kind of which they should not lightly be deprived. When parties are added by the Court after the institution of a suit under O. 1, R. 10 (2), S. 22, Limitation Act, provides that the date when they are added is to be deemed to be the date of the institution of the suit so far as they are concerned for purposes of limitation and the rights which they may have acquired under the Limitation Act are, therefore, sufficiently safeguarded. The addition of a respondent whom the appellant has not made a party to the appeal is expressly dealt with in O. 41, R. 20 on which the plaintiff relied, both, in the appellate Court and before their Lordships. That rule empowers the Court to

make such party a respondent when it appears to the Court that he is interested in the result of the appeal.

Giving these words their natural meaning—and they cannot be disregarded—it seems impossible to say that in this case the defendants against whom these suits have been dismissed, and as against whom the right of appeal has become barred, are interested in the result of the appeal filed by the plaintiff against the other defendants. It was for the plaintiff-appellant, who applied to the Court to exercise its powers under this rule, to show what was the nature of their interest and this he has failed to do.

Their Lordships are, therefore, of opinion that the appellate Court were right in rejecting his application under this rule.

The appellate Court was then asked to take action under O. 41, R. 33. That rule empowers an appellate Court to pass any decree and make any order which ought to have been passed or made, and to make or pass such further decree or order as the case may require, and provides, further, that this power may be exercised notwithstanding that the appeal is as to part only of the decree and,

may be exercised in favour of all or any of the respondents or parties, although such respon-

dents or parties may not have filed any appeal or objection.

Here the plaintiff, whose suits had been dismissed against all the defendants, failed to appeal against the decrees in so far as they affected some of them and allowed the appeal as against them to become barred. In these circumstances the appellate Court, in the exercise of their discretion, refused to take action under the rule so as to deprive these defendants of the very valuable right which they had acquired in consequence of the plaintiff's failure to appeal against the decrees in so far as they affected them. Assuming that under this rule the Court in a proper case might add a defendant as respondent for the purpose of passing a decree against him, their Lordships see no sufficient reason for interfering with the refusal of the appellate Court to do so in this instance. They are, therefore, of opinion that these appeals fail on both grounds, and will humbly advise His Majesty that they should be dismissed with costs.

D.D.

Appeals dismissed.

Solicitors for Appellant—*Custer, Allington & Ford.*

Solicitors for Respondents—*Brammell & Brammell.*

A. I. R. 1927 Privy Council 257

(From Madras)

10th March 1927

VISCOUNT DUNEDIN, LORD DARLING
AND SIR LANCELOT SANDERSON*Krishna Reddi*—Appellant.

v.

Gandavaram Raghava Reddi and
another—Respondents.

Privy Council Appeal No. 7 of 1924.

Civil P. C., S. 100—*Finding is binding unless there is no evidence to support it.*

Findings of fact by lower appellate Court are binding upon the High Court in second appeal unless it could be said that there was no evidence to support them. [P 260 C 1]

K. V. L. Narasimham—for Appellant.*L. DeGruyther* and *E. B. Raikes* — for Respondents.

Sir Lancelot Sanderson.—This is an appeal by the plaintiff, Krishna Reddi, and a cross-appeal by Gandavaram Raghava Reddi and Kodur Venkata-perumal Reddi, defendants 3 and 4, from a judgment and decree dated 19th April 1920, of the High Court of Madras, in Letters Patent Appeal No. 23 of 1918.

The suit was brought as long ago as 1910, and it has had a chequered career. Defendant 1, Varada, was the father of defendant 2, Venkatarama, and the plaintiff is the son of defendant 2, and they are members of a joint undivided Hindu family. Venkatarama, defendant 2, had two wives; by his first wife he had a daughter, and by the second he had an only son, viz., the plaintiff.

It was alleged on behalf of the plaintiff that he and his mother were obliged to leave the home of defendant 2, and to live with the plaintiff's mother's people for some three-and-a-half years before the suit was brought.

Defendants 3, 4 and 5 were alleged to be close friends of defendant 2. By a document dated 22nd January 1910, defendant 1, Varada, purported to sell to defendant 3 properties comprised therein and specified in Sch. A to the plaint. The consideration was alleged to be Rs. 15,000 and the property was alleged to be the self-acquired property of defendant 1.

On the same day, defendants 1 and 2 (defendant 2 purporting to act for himself and his minor son, the plaintiff), by another document purported to convey to defendant 4 the property comprised

therein, and described in Sch. B to the plaint. The consideration was alleged to be Rs. 20,000, through a bond executed in favour of defendant 2 for discharging certain debts specified therein, and also other family debts.

On 9th February 1910, defendant 2 purported, by means of an alleged deed of gift of that date, to give certain properties specified in Sch. C to the plaint in favour of a temple, of which defendant 5 was trustee.

The plaintiff alleged that the properties specified in Sch. A, B and C were joint family properties of the family, of which the plaintiff and defendants 1 and 2 were members, that the above-mentioned alleged deeds of sale and the deed of gift were fraudulent and devoid of consideration, that there was no legal necessity, and that the alleged deeds were nullities.

On 31st January 1910, the alleged deeds of sale were registered, in spite of the plaintiff's mother's objection before the Registrar.

The suit was brought on 15th April 1910 and the plaintiff claimed therein a declaration that the sale-deeds and the deed of gift were null and void and that he should be put in possession of the above-mentioned properties on behalf of the joint family. There was an alternative prayer for partition in case it was held that the deeds were in any way binding on the interests of defendants 1 and 2.

The case of the contesting defendants, viz., defendants 3 and 4, was that the sales were bona fide and that consideration passed for them, and that title was intended to and did actually pass to them.

Defendant 1 was an old man, and it was alleged that defendant 2 was acting as manager of the family.

The learned Subordinate Judge found that the sale-deeds were made to defraud the plaintiff, that they were not bona fide to discharge antecedent debts, and that they were not valid as against the plaintiff to the extent of his share, viz., one-quarter. He held that the properties in Sch. A were joint family properties. This finding is not now disputed. He held, further, that the gift of the properties in Sch. C was invalid. This finding also is not now disputed.

While holding that there was consideration and that title was intended to pass under the two deeds of sale, he found there was no necessity for the sales and made a decree, dated 15th April 1913, that defendants 3 and 4 should put the plaintiff in possession of his share of the properties on his paying into Court Rs. 2,945-11-6 (i. e. one-quarter of Rs. 11,782-14-0), to be paid to defendants 3 and 4 in the way they might arrange between themselves. It was further ordered that defendant 5 should put the plaintiff in possession of the properties comprised in Sch. C.

The above-mentioned sum of Rs. 11,782-14-0 is explained by the fact that the learned Subordinate Judge found that debts to the extent of Rs. 11,782-14-0 had been discharged by defendant 4.

The plaintiff and defendants 3 and 4 appealed against this decree to the learned District Judge. The plaintiff alleged that the alienations should have been set aside in toto as void, and defendants 3 and 4 urged that the alienations were made for justifiable necessity and should have been upheld and the plaintiff's suit should have been dismissed.

The learned District Judge held that Ex. 1 and 2, which are the alleged sale deeds of 22nd January 1910, not bona fide sales, but were resorted to screen the properties in case the plaintiff should bring a suit. In a later part of his judgment he held that in pursuance of a scheme to defraud the plaintiff or his family the alienations were made, and defendants 3 and 4 actively participated in the fraud. He held, further, that the transactions were void even if consideration passed.

He made a decree reversing the decree of the trial Court, in so far as it was against the plaintiff, and declaring that the plaintiff was entitled to get the sales of Sch. A and B lands set aside, and that plaintiff should recover possession of the said Sch. A and B lands on behalf of the family on payment of Rs. 11,782-14-0, the amount of the debts which had been discharged by defendant 4. The plaintiff's appeal was allowed and the appeal of defendants 3 and 4 was dismissed.

Their Lordships understand that the decree of the learned Subordinate Judge, as regards the properties comprised in Sch. C, was not interfered with.

Defendants 3 and 4 appealed to the High Court of Madras and the plaintiff filed cross-objections. The learned Judges of the High Court, who heard the appeal, remanded the case to the lower appellate Court on the grounds that the learned District Judge had not recorded a formal decision on the question whether the alleged sale-deeds effected any real alienations, and that the learned District Judge had apparently decided the appeal on the ground that in any event a finding that the sales were merely fraudulent was a sufficient basis for the grant of the relief asked for. They required the learned District Judge to submit findings on the following issues :

(1) Whether the alienation of A and B scheduled properties is not supported by consideration?

(2) Did either or both of the documents, Exs. 1 and 2, effect a real transfer of the property which they purported to convey?

Exhibit 1 is the deed of 22nd January 1910, in favour of Raghava (defendant 3), and Ex. 2 is the deed of 22nd January 1910, in favour of Venkataperumal (defendant 4).

The learned District Judge, on remand, found that the real object in resorting to sales was to screen the properties from the plaintiff, and that no consideration really passed ; that the parties did not intend that the transactions should be genuine, and that the promissory notes only served to give an appearance of truth to the transactions.

On the two above-mentioned issues he found that Exs. 1 and 2 were not supported by consideration and that those documents did not effect a real transfer of the properties which they purported to transfer.

On the further hearing of the appeal, and upon the above-mentioned findings of the learned District Judge, the learned Judges of the High Court were agreed that the lower Court's findings must be accepted, and said that they would deal with the decree on the footing that as against the plaintiff at least the alienations of Sch. A and B properties were not for consideration and that Ex. 1 and 2 effected no real transfers.

Unfortunately, the learned Judges could not agree as to the course which should be adopted. They however, came to the conclusion that the opinion of the senior Judge should prevail, and accordingly they directed that the learned District Judge should be called upon to

submit a further finding as proposed in the judgment of the senior Judge. The case, therefore, was again remanded to the learned District Judge for a finding on the issue whether as between defendants 1 and 2 and defendants 3 and 4 Exs. 1 and 2 effected a conveyance wholly or partially valid of the former's shares to the latter.

The learned District Judge submitted his finding as follows :

For these reasons, and for those set forth in in my previous finding, I find that, as between defendants 1 and 2 and defendants 3 and 4 Exs. 1 and 2 did not effect a conveyance of the former's share to the latter.

The appeal then came once more before the learned Judges of the High Court.

The senior Judge came to the conclusion that the appeal of defendants 3 and 4 should be dismissed and that the plaintiff's memorandum of objections should be allowed.

The other learned Judge agreed that the final order should be as proposed by the senior Judge, but stated that he still adhered to the opinion which he expressed in his previous judgment and would have passed an order in the terms therein mentioned. The decree of the High Court, dated 15th February 1918, therefore, was to the effect that the decrees of the lower appellate Court and of the Court of first instance should be set aside, and a declaration was made that the sale-deeds of the 22nd January 1910, and the deed of gift dated 9th February 1910, were null and void and not binding on the plaintiff's family; and the Court further decreed that defendants 3 and 4 should put the plaintiff in possession of the plaint Sch. A, B and C properties, and that the Subordinate Judge should hold an enquiry regarding future mesne profits until date of delivery or three years from that date, whichever should be nearer, and pass a decree for them under O. 20, R. 12. The decree contained a further direction for the payment by defendants 3 and 4 of the plaintiff's costs.

This, however, was not the end of the proceedings in the High Court, for, as the learned Judges had differed, defendants 3 and 4 appealed under the provisions of the Letters Patent from the decisions of the learned senior Judge of the Division Bench. This appeal was heard by the learned Chief Justice and two other Judges of the High Court. The

three learned Judges accepted the findings of the learned District Judge, which they stated were also accepted by the learned Judges of the Division Bench, viz., that the sales were purely sham transactions intended to defeat the plaintiff.

They then stated that the only other question for consideration was whether the learned District Judge was right in making the relief which he had given to the plaintiff dependent upon the payment of the sum paid by defendants 3 and 4 for the discharge of the joint family debts. It should be noted that this order of the learned District Judge was not quoted correctly. The relief given by the learned District Judge to the plaintiff was dependent upon the payment of the debts which had been discharged by defendant 4; there was no reference to any sum paid for the discharge of debts by defendant 3 in the decree of the learned District Judge.

The learned Judges came to the conclusion that there was no reason for interfering with that part of the decree of the learned District Judge. They, therefore, decided to modify the decree made by the learned senior Judge of the Division Bench of the High Court by making the decree for possession dependent upon the payment by the plaintiff in the manner provided in the decree of the District Judge, and directing that the amount should bear interest at 6 per cent. from the date of the decree of the Subordinate Judge. The decree, as drawn up, directed that defendants 3 and 4 should put the plaintiff in possession of the plaint Sch. A, B and C properties on payment by the plaintiff of Rs. 11,782-14-0, and that the said amount should carry interest at 6 per cent. per annum from 15th April 1913, until the date of payment.

It is to be noted that the decree, as drawn up, went further than the judgment of the learned Judges who heard the Letters Patent appeal. The decree of the learned District Judge provided that the plaintiff should recover possession of the said Sch. A and B lands on payment of the sum of Rs. 11,782-14-0.

The recovery of the Sch. C lands by the plaintiff was not dependent upon the payment of the said sum.

But the decree made by the learned Judges who heard the Letters Patent appeal made the recovery of Sch. C lands

dependent upon the above-mentioned payment, as well as the Sch. A and B lands.

Since the decree of the learned Subordinate Judge, which directed that defendant 5 should put the plaintiff in possession of Sch. C lands, there had been apparently no question as to this part of the case.

The decree in the Letters Patent appeal directed defendants 3 and 4 to put the plaintiff in possession of Sch. C lands, although, as far as their Lordships know, defendants 3 and 4 had nothing to do with Sch. C lands. It is, therefore, apparent that the decree appealed from cannot stand in its present form.

There is, however, a serious question whether there is any reason why the decree of the Division Bench of the High Court, dated 15th February 1918, should be interfered with. It was argued on behalf of defendants 3 and 4 before the Board that the learned Judges of the Division Bench of the High Court were wrong in remanding the case for a finding upon the two issues, which have already been referred to. Their Lordships are not prepared to hold that the learned Judges were wrong in remanding the case for a clear and definite finding upon the issues whether the alienation of A and B scheduled properties was not supported by consideration, and whether either or both of the documents, Ex 1 and 2, effected a real transfer of the property which they purported to transfer.

Their Lordships agree with the learned Judges that definite findings on these issues were material and necessary.

If, then, the remand was not wrong, the findings of fact made by the learned District Judge upon these two issues were binding upon the High Court unless it could be said that there was no evidence to support them. Their Lordships are clearly of opinion that such an objection to the findings cannot be upheld. The findings of the learned District Judge were adopted by the learned Judges of the Division Bench which heard the second appeal and by the learned Judges who heard the Letters Patent appeal, and their Lordships see no reason for differing from the conclusion arrived at by all the High Court Judges in this respect.

There remains the question whether, in view of these findings, there was any ground for altering the decree of the Division Bench dated 15th February 1918.

The learned Judges who heard the Letters Patent appeal apparently concluded that it would not be equitable to allow the plaintiff to recover possession of the Sch. A and B property unless he paid the amount of the debts discharged by defendant 4. In view, however, of the above-mentioned findings, which must be accepted, it cannot be held that defendant 4 did discharge family debts as alleged.

The finding to that effect, which may be said to arise from the learned District Judge's decree of 26th February 1915, must be considered to have been eradicated, when the learned District Judge, on remand and on further consideration of the evidence, came to the conclusion that there was no consideration for either of the alleged sale deeds, Ex. 1 and 2, and that these deeds did not effect a real transfer of the properties.

Subject to a further question which was raised by the learned counsel on behalf of defendants 3 and 4, their Lordships are of opinion that there was no ground for interfering with the decree of the Division Bench of the High Court dated 15th February 1918.

The other point to which reference has been made is as follows: It was argued on behalf of defendants 3 and 4 that, as between defendant 2 (viz., Venkatarama, the father of the plaintiff) and defendants 3 and 4, there was no reason for holding that the transfer was not complete, and that a decree should be made declaring that defendants 3 and 4 were entitled to the share of defendant 2 in the above-mentioned properties.

Their Lordships are not satisfied that this point was raised before the learned Judges who heard the Letters Patent appeal, and, in view of the findings of the learned District Judge, that no real transfer was intended or effected between the above-mentioned parties, they are not prepared to enter upon the question further.

For the reasons herein contained their Lordships will humbly advise His Majesty that the plaintiff's appeal should be allowed and that defendants 3 and 4 should pay to him his costs of the appeal before this Board; that the decree of the High Court in the Letters Patent appeal No. 23 of 1918, dated 19th April 1920, be set aside with costs, and that the decree of the High Court in Second Ap-

peal No. 711 of 1915, dated 15th February 1918, should be restored, and that the cross-appeal of defendants 3 and 4 should be dismissed with costs.

D.D. *Appeal allowed.*

Solicitors for Appellant — *Douglas Grant & Dold.*

Solicitors for Respondents—*T. L. Wilson & Co.*

A. I. R. 1927 Privy Council 261

(From Madras)

19th July 1927

VISCOUNT DUNEDIN, LORDS SHAW AND SINHA, AND SIR JOHN WALLIS.

Alwar Naidu and another—Appellants.

v.

Kothandapani Naidu and others—Respondents.

Privy Council Appeal No. 66 of 1925.

Mortgage—Satisfaction.

In a suit on mortgage, defendants set up a case of discharge, relying on the fact that the mortgage-deed had come into their possession and purported to bear an endorsement of discharge by the plaintiffs' father. Plaintiffs alleged that the document was stolen from them. It was found that the defendants had deposited with the plaintiff's father the title-deeds of the mortgaged property at the time of the mortgage and they were still in possession of the plaintiffs.

Held : that that fact considerably weakened the presumption in favour of defendants arising from the possession of the mortgage document. [P 261 C2]

K. V. L. Narasimham—for Appellants.

Sir John Wallis.—In this case either the plaintiffs are suing to recover a mortgage debt already discharged, or the defendants are setting up a false case of discharge, relying on the fact that the mortgage-deed has come into their possession and purports to bear an endorsement of discharge by the plaintiffs' father, who had admittedly lent money to defendant 1 and taken a mortgage bond in the name of his son, plaintiff 2. The Subordinate Judge of Trichinopoly found, on a full consideration of the evidence that the plaintiffs' case was true and the defence totally false, while the learned Judges of the High Court held that the possession of the document bearing an endorsement of discharge threw heavily on the plaintiffs the onus of prov-

ing that the document was stolen from them and the endorsement forged, and that they had failed to discharge it. The respondents were not represented at the hearing of this appeal, and their Lordships unfortunately have not had the advantage of hearing counsel on their behalf. They have, however, very carefully considered the evidence, and have come to the conclusion that the Subordinate Judge was right in finding in favour of the plaintiffs.

On the 1st August 1916, defendant 1 (who was the father of defendants 2 and 3), for the consideration recited in the deed executed a mortgage bond in favour of the plaintiff 2, making the mortgage debt repayable on or before the 31st August 1918. At the same time he deposited with the plaintiffs the title-deeds of the mortgaged property, which are still in possession of the plaintiffs, and the fact that he did not get them back at the time of the alleged discharge when, his case is, the document itself was returned to him, in their Lordships' opinion, considerably weakens the presumption in his favour arising from the possession of the mortgage document. Defendant, no doubt, endeavoured to explain this on the ground that the plaintiffs' father insisted on retaining them until payment of a promissory note for Rs. 500, by which according to the endorsement alleged to be forged, the balance of the mortgage debt was discharged. He also endeavoured unsuccessfully to show that some of the deeds had been returned to him. Apart, however, from the question of onus, their Lordships are satisfied that the defendants' story of discharge is false. In coming to this conclusion they have necessarily disregarded the finding of the learned Subordinate Judge, based on comparisons of handwriting, that the Tamil endorsement of discharge on the mortgage-deed was not in the handwriting of the plaintiffs' father, inasmuch as the learned Judges of the High Court do not accept this conclusion, and the question is one as to which necessarily their Lordships are not in a position to form any opinion of their own. (The judgment then discussed the evidence and concluded.) They agree with the finding of the learned Subordinate Judge that the case of discharge set up by the defendants is false, and they will accordingly humbly advise His

Majesty that this appeal be allowed and the suit decreed with costs in the Courts below and before this Board.

D.D. *Appeal allowed.*

Solicitors for Appellants—*H. S. L. Polak.*

A. I. R. 1927 Privy Council 262

(*From Gold Coast Colony.*)

16th June 1927.

VISCOUNT HALDANE, LORDS SHAW AND WARRINGTON OF CLYFFE.

Manche Anege Akue—Appellant.

v.

Manche Kojo Ababio IV—Respondent.

Privy Council Appeal No. 161 of 1924.

Land Acquisition—*Land in exclusive possession of a person—He has prima facie claim to the compensation.*

Where at the time of acquisition the land acquired is found to be in the sole and exclusive possession of one, that one is prima facie entitled to the compensation money and any other person claiming the money must prove a better title in himself. [P 263 C 1]

R. M. Montgomery and J. A. Johnston—for Appellant.

Gavin T. Simonds and M. N. Drucker—for Respondent.

Lord Warrington of Clyffe.—The subject matter of the litigation in which the present appeal arises is a sum of money representing the purchase money paid by the Government of the Colony for certain lands taken by them for public purposes under statutory powers.

Rival claims were made to this money. The appellant, the Manche or chief of Sempe, claiming on behalf of communities known as Sempe and Akumaji, asserts that those communities are entitled to share in the fund. The respondent, the Manche of James Town and also the Manche of Alata asserts, that he, as Manche of Alata, is solely entitled to the fund on behalf of that community.

On 24th July 1918, the Divisional Court, consisting of the Chief Justice, Sir Philip Crampton Smyly, rejected the claim of the appellant and gave judgment in favour of the respondent. On 16th May 1924, this judgment was unanimously affirmed by the full Court, composed of Michelin, J., and acting Judges Gardiner Smith and Aitken. Leave to appeal from this judgment to

His Majesty in Council was obtained on 18th August 1924.

The town of Accra consists of three divisions, of which one is James town. Each division has a Manche, or chief, who is himself subordinate to a superior chief called the Ga Manche. The respondent is the Manche of James town.

James town is divided into three quarters, known as Sempe, Akumaji and Alata respectively, each with its own Manche subordinate to the Manche of James town. The appellant is the Manche of Sempe. The respondent, as Manche of James town, claims to have vested in him all property belonging to any of the three stools of Sempe, Akumaji and Alata. This claim was formerly disputed by the Manche of Sempe, but was upheld by a judgment of the full Court in an action by the present respondent against one Quarthey.

The question at issue is whether the lands, the purchase money for which is the subject of the litigation, were lands of the three quarters of Sempe, Akumaji and Alata in common or of the quarter of Alata alone.

According to a tradition which appears to be accepted by both sides, the Alata people came into the country with one Wetse Kojo, from Lagos in or about the year 1642. They assisted the Sempe and Akumaji people in their wars with a neighbouring tribe, and as the result the lands of the Sempe and Akumaji people were placed under the stool of Wetse Kojo, and he and his successors thus became not only Manches of Alata, but also Manches of James town.

It was found as a fact by both Courts in the Colony that the lands in question were exclusively used and occupied by the alatas, and it was admitted by counsel for the appellant that the finding means that those lands were originally settled by the alatas, the several villages and so forth being founded by them. This finding is accepted by the appellant.

It was further found by both Courts that by the custom of the Ga tribe land which had been exclusively used by the inhabitants of a particular quarter of James town belonged exclusively to that quarter.

At the trial, the contest appears to have been mainly in reference to the question of the exclusive use and occu-

pation by the alatas, and it does not seem to have been seriously disputed that if this were established the result mentioned above would follow.

In their Lordships' opinion no ground has been shown for interfering with the decisions of the Courts below, and the appeal therefore fails.

The appeal might be decided on the further ground that inasmuch as the land was, when taken by the Government, in the exclusive use and occupation of the alatas, the appellant must, in order to succeed, establish that he has a better title than the respondent; in other words, that the onus is entirely on him and that he wholly fails to discharge himself thereof.

On either ground the appeal fails, and their Lordships will humbly advise His Majesty that it should be dismissed with costs.

D.D. *Appeal dismissed.*

Solicitors for Appellant — *Ashurst, Morris, Crisp & Co.*

Solicitors for Respondent — *Monro, Saw & Co.*

* A. I. R. 1927 Privy Council 263

(From Ceylon)

17th June 1927

LORD CHANCELLOR, VISCOUNT
HALDANE, LORDS BLANESBURGH
AND DARLING.

Henry Peter Christopher De Silva—
Appellant.

v.

Dorothy Margaret Catherine De Silva
and another—Respondents.

Privy Council Appeal No. 66 of 1926.

* Privy Council — Practice — Action for
divorce—Damages awarded to husband—Deci-
sion as to amount will not be disturbed by
Privy Council.

A decision, on the amount of damages to be paid to the husband by the co-defendant, in an action for divorce, of the Supreme Court of Ceylon, who clearly had jurisdiction to review the amount of damages awarded, had all the facts before them; knew the value of money in the Ceylon Island, and were in a position to form an opinion as to what was a reasonable sum to be awarded in such a case, will not be disturbed by the Privy Council. [P 263 C 2]

L. DeGruyther and *T. Bucknill*—for
Appellant.

G. D. Nokes and *H. J. Wallington*—
for Respondents.

The Lord Chancellor.—This was an action for divorce brought by a husband against his wife and a co-defendant on the ground of adultery. The action succeeded, an order for divorce was made, and also an order for a settlement to be made upon the husband for his life out of the property of the wife, who was a rich woman. As to that part of the order, there is no appeal here. The only question arising on this appeal is as to the amount of damages which should be ordered to be paid by the co-defendant, who, in this country, would be referred to as the co-respondent, to the husband. The District Judge fixed the damages at Rs. 10,000 but on appeal to the Supreme Court of Ceylon that amount was reduced to Rs. 2,500, and the question is whether the order of the Supreme Court was right.

It is impossible for this Board in such a matter to re-assess the amount of damages. The real question is whether there is enough to induce the Board to disturb the decision at which the Supreme Court arrived. Upon the whole, their Lordships do not think that there is. The Supreme Court clearly had jurisdiction to review the amount of damages awarded: they had all the facts before them; they knew the value of money in the Island, and they were in a position to form an opinion as to what was a reasonable sum to be awarded in such a case. Their Lordships consider it unnecessary to go through all the facts; it is enough to say that in their Lordships' opinion there is weight in the reasons given by the Judges of the Supreme Court for their decision, and that their Lordships are not inclined to differ from the conclusion at which they arrived. Their Lordships will humbly advise His Majesty that this appeal fails and should be dismissed with costs, including the costs of the petition for leave to adduce further evidence.

D.D. *Appeal dismissed.*

Solicitors for Appellant—*O. A. Cayley.*

Solicitors for Respondents — *G. R. Cran, W. H. Speed & Co.*

A. I. R. 1927 Privy Council 264

(From Gold Coast Colony)

5th May 1927

VISCOUNT HALDANE, LORDS SHAW
AND WARRINGTON OF CLYFFE.

Kojo Pon—Appellant.

v.

Atta Fua—Respondent.

Privy Council Appeal No. 48 of 1925

(a) Privy Council—Practice.

In cases coming before the Privy Council from the Dominions of the Crown first consideration of the Privy Council always is to secure if possible that substantial justice is done. [P 265 C 1]

(b) Civil P. C., C. 41, R. 10 — Security for costs—Surety bond signed by representative of appellant — His authority must be proved — Appellate Court should not decide the appeal on such point.

In an appeal the appellant was required to furnish security for costs; the security bond was signed by one K acting on behalf of the party. The Registrar of the appellate Court accepted the bond but at the time of hearing the appellate Court holding that K's authority to execute the bond was not proved dismissed the appeal.

Held: that the appeal Court could have adjourned the hearing until a proper bond was executed but it should not have dismissed the appeal. [P 265 C 2]

R. M. Montgomery and J. A. Johnston
—for Appellant.

Viscount Haldane. — In this case their Lordships have the difficulty, which imposes the necessity of great caution, that the appeal come here *ex parte*. Consequently they felt it right to look very minutely at what has been said and at the particular rules that concern it; nevertheless, on those rules and on what has transpired, they think that there is sufficient before them to enable them to deal with the case at once.

The appeal is brought from a judgment of the Supreme Court of the Gold Coast Colony, which had to entertain an appeal from the judgment of Sir Philip Crampton Smyly, the Chief Justice. Sir Philip Crampton Smyly had non-suited the plaintiff in an action on the ground of want of jurisdiction, and the appeal really involved the whole merits. It raised an elaborate question as to the title to native lands. When the present appellant proposed to appeal to the Supreme Court of the Gold Coast he had, of course, to conform with what the Rules of Court required, and he applied for and

obtained from the Divisional Court conditional leave to appeal against the judgment of the Chief Justice, subject to certain conditions being fulfilled within one month of the date of his application. Among these conditions was this, that £100 was to be paid into Court to await any order as to costs that might be awarded to the respondent by the appeal Court in the case of his success, or a bond was to be entered into with two sureties to be justified in the sum of £50 each. It was on the 7th July 1922, that that order was made, and the appellant proceeded to enter into the bond prescribed by the order. There is no doubt, their Lordships think, that it was quite in accordance with the rules to prescribe this. The Rules of Court are enlightened and comprehensive and they give practically all the powers that the Courts here have. Under O. 5, Sch. 1 to the Rules there is a direction that the Court may in all causes and matters make any order which it considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not.

Then there is a series of further rules contained in O. 11, which are, again, very comprehensive.

When by the rules of the schedules of this Ordinance any act may be done by any party in a suit, such act may be done either by the party in person, or by his solicitor or agent, if it can be legally done by an agent.

Under O. 53 Sch. 2, the appellant has to give security for costs of an appeal; but that obligation is imposed only in very general terms. There are specific directions as to the powers of the appeal Court to require security for costs, and then, generally, that they may make any order necessary for determining the real question in controversy in the appeal, and that there is full jurisdiction over the whole suit as if the same had been instituted and prosecuted in the appeal Court of first instance, with power to give any judgment and make any order which ought to have been made, and to make such further order as the case may require.

That being the law and the plaintiff having been ordered to give security for the costs of his appeal, the plaintiff proceeded to enter into the bond which he was directed to execute. He was represented through the proceedings by Kwabena Asiamah, and Kwabena Asiamah, who conducted the proceedings for him, ex-

uted the bond. When the bond was dated 10th July 1922 it provided security for the costs of the appeal to the respondent if they were given to the respondent, and then it was executed by Kwabena and two sureties in the presence of Mr. White, the Chief Registrar to the Court, and it purported to be executed by Kwabena as the representative of Kojo Pon. That was as long ago as 10th July 1922, and, whether or not the parties knew about it, the Court must be taken to have known that their Registrar had accepted the security.

The case came on by degrees, and finally it was reached for hearing by the Court of appeal in April 1924, and it was heard and judgment was delivered by Mr. Justice Micheline, Mr. Justice Hall and Justice Gardiner Smith upon the 10th April, 1924. These learned Judges accepted a point which their Lordships think they ought not to have accepted. It was argued by counsel for the respondent, by way of preliminary objection, that the conditions of appeal had not been fulfilled, inasmuch as the bond for the costs of the appeal was not signed by the appellant, but by Kwabena, purporting to act as his representative. It was argued that the Court having granted only conditional leave to appeal, it was incumbent on the plaintiff himself to execute the bond, and Kwabena could not execute the bond, unless he had first obtained an order from the Court authorising him to do so. The learned Judges held that, as regards the bond to be entered into with two sureties to be justified in the sum of £50 each, no proof had been given of the authority of Kwabena to execute on behalf of the appellant; the authority of Kwabena ought to be strictly proved; and the bond must, therefore, be taken to have been invalid and that the defect was fatal to the appeal.

Their Lordships wish to say that in cases coming before them from the Dominions of the Crown, their first consideration always is to secure, if possible, that substantial justice is done. That may not always be possible. There may be conditions in the local law or in the rules which preclude the possibility of getting round technical obstacles and doing complete justice. But they think that in the case of the rules of procedure in the Gold Coast Colony there are no

such obstacles. The Court was invested with the widest powers, and it might have adjourned the hearing of the appeal until a proper bond was executed, or it might have said that an affidavit was sufficient; and that was the more incumbent on the Court because its own Registrar had accepted the bond executed by Kwabena on behalf of the appellant.

Under these conditions their Lordships think that to refuse to hear the appeal merely on the ground of what might have been a mere technicality about the bond was to fail to do justice as between the parties, and they are of opinion that the case must be remitted to the Court below to deal with it again, hear it and, if necessary, get some formal proof of Kwabena's authority; but as at present advised, their Lordships do not think that necessary inasmuch as Kwabena's authority was accepted by the Registrar, and inasmuch as he had acted right through, and nobody till the other day ever challenged his authority. However, that may be dealt with by the Court below, if they think it necessary to deal with it at all. For the present it is enough to say that the case must go back and be heard out.

Then comes the question of what to do with the costs of this appeal. It has only been *ex parte* before the Board, and it may be that the appeal will not be fruitful; it may so turn out.

Their Lordships therefore think that the right course will be that the appellant's costs should be included in any costs he may recover in the Court below. If he recovers no costs in the Court below, he will not get any costs of this appeal, but he will not have to pay any costs. On the other hand, if he succeeds, he will get these costs. Their Lordships will humbly advise His Majesty accordingly.

D.D.

Case remitted.

Solicitors for Appellant — *Ashurst, Morris, Crisp & Co.*

A. I. R. 1927 Privy Council 266

(From Madras)

8th December 1927

VISCOUNT SUMNER, LORDS ATKINSON
AND SINHA, SIR JOHN WALLIS AND
SIR LANCELOT SANDERSON

R. Arunachala Nayudu—Appellant.

v.

S. R. Balakrishna and Co.—Respondents.

Privy Council Appeal No. 69 of 1926.

Evidence—Appreciation.

The finding of fact of trial Court on the oral evidence should not be lightly interfered with as that Court is in a much better position to gauge the truth and value of the oral evidence than the appellate Court. [P 267 C 2]

B. Dube--for Appellant.

L. De Gruyther and T. C. K. Kurup—for Respondents.

Sir Lancelot Sanderson.—These are consolidated appeals by Arunachala Naidu against the judgment of the High Court of Judicature at Madras dated 23rd April 1924, and two decrees of the same date made in pursuance of the above-mentioned judgment.

On 5th August 1918, the respondents, Messrs. S. R. Balakrishna & Co., brought a suit (eventually numbered 27 of 1919) against Arunachala Naidu in the Court of the learned Subordinate Judge of South Malabar at Calicut, praying (amongst other things) for a decree for delivery of possession of the properties therein referred to.

On 23rd October 1918, Arunachala Naidu brought a suit (eventually numbered 28 of 1919) against Messrs. S. R. Balakrishna & Co. in the same Court praying, amongst other things, for a decree directing the defendants to execute a registered deed of sale of the said properties to the plaintiff.

The learned Subordinate Judge tried the two suits and delivered one judgment. He dismissed Messrs. Balakrishna & Co.'s suit (No. 27 of 1919) with costs, and in suit No. 28 of 1919 he directed the defendants, Messrs. Balakrishna & Co., to execute a deed of conveyance to the plaintiff, Arunachala Naidu, of the property in suit; the learned Judge made other incidental orders, to which it is not necessary to refer in detail.

Messrs. Balakrishna & Co. appealed against both decrees to the High Court of Judicature at Madras. The High

Court heard the two appeals together and delivered one judgment by which the appeals were allowed and the decrees of the learned Subordinate Judge were reversed.

A decree was made by the High Court in suit No. 27 of 1919 directing the defendant Arunachala Naidu, to deliver possession to the plaintiffs of the properties referred to in the schedule annexed to the plaint and ordering the defendant to pay the plaintiffs' costs.

In suit No. 28 of 1919 the decree of the High Court, after reversing the decree of the learned Subordinate Judge, ordered the defendants, Messrs. Balakrishna & Co., to pay to the plaintiff the sum of Rs. 4,359-3-6. In other respects the plaintiff's suit was dismissed and each party was directed to bear his or their own costs in both Courts.

From these two decrees of the High Court Arunachala Naidu has appealed. In this judgment he will be referred to as the appellant and Messrs. Balakrishna & Co. as the respondents.

It appears that the appellant was a timber merchant, that he had agreed to purchase the above-mentioned properties, which were forest tracts in Wynaad, from a Mr. Hoskins for Rs. 9000, that he had paid a deposit of Rs. 1,000, but that he was unable to pay the whole of the purchase money.

Subsequently it was arranged that the respondents, who were carrying on a timber trade in Calicut, should pay the balance of the purchase money, take a conveyance of the properties in their name, and lease the property to the appellant on the condition that the appellant should deliver timber to the respondents within specified times, and if it was found at any time within the fixed period that the cost of timber supplied came to Rs. 9,000 after making certain deductions, the respondents would assign the properties to the appellant at his expense. The agreement was dated 27th November 1915, and the terms are as follows.—(After reciting the terms of the contract in detail the judgment proceeded.) The main question argued on this appeal was whether the appellant had supplied the timber in accordance with the agreement to the value of Rs. 9,000; there were further questions, viz., whether the timber, if supplied, was delivered within the

time specified in the agreement, whether time was of the essence of the contract, and whether the time was extended by agreement between the parties.

There was a subsidiary question whether the amount due to the appellant in respect of certain scantlings could be taken into consideration in calculating the amount and value of the timber delivered by the appellant under the agreement.

Their Lordships may dispose of this last-mentioned question at once.

Clause 13 of the agreement provided that defective timber felled on the hills was to be sawn into scantlings and delivered to the respondents, who were to sell the scantlings on behalf of the appellant and credit him with the proceeds of the sales after deducting 5 per cent. commission.

It is clear from the terms of the clause that the above-mentioned delivery was not contemplated by the parties as a delivery of timber, which was to be taken into consideration when ascertaining whether timber to the value of Rs. 9,000 had been delivered to the respondents.

The learned Subordinate Judge in his judgment included the sum of Rs. 3,119-14-4 in respect of the scantlings on the one side of the account, and on the other side charges amounting to about Rs. 2,651 in respect of scantlings. Their Lordships are of opinion that the conclusion of the High Court was right in respect of this matter, and that the items relating to scantlings must be excluded from calculation.

On the main question the learned Subordinate Judge held that on account of the supply of logs the appellant was entitled to be credited with the sum of Rs. 15,074-10-10, subject to certain deductions. The High Court, however, was of opinion that the total value of timber supplied by the appellant to the respondents was Rs. 10,839-15-0, subject to certain deductions which reduced the amount, for which the appellant was entitled to credit, considerably below the sum of Rs. 9,000.

The arguments presented to their Lordships in respect of this main question related to two matters : firstly, the number of logs alleged to have been delivered by the appellant to the respondents, and secondly, the measurement of the logs.

On the first point the learned Subordi-

nate Judge held that it had been proved that the total number of logs delivered was 341 ; the High Court came to the conclusion that 316 only had been delivered.

Thus there was a difference of 25 logs.

The disputed 25 logs fell under two heads : (1) 7 red cedar logs and (2) 18 logs generally. (1) The High Court held that the evidence of the cartmen relating to the delivery of the seven red cedar logs was worthless, and that it was extremely unsafe to rely upon a receipt which the appellant's witnesses alleged had been given by the respondents' servant, which was Ex. 62 (c).

The learned Subordinate Judge, who tried the suit and who had the opportunity of seeing the witnesses and hearing them give their evidence, said as follows :

There is no reason to think that Ex. 62 (c) was not signed by the Moopan and that the witnesses examined by defendants (now the appellant) are giving false evidence. I believe the evidence adduced by the defendant and find that seven red cedar logs mentioned in invoice 143 were received by the plaintiffs (now the respondents).

Their Lordships having considered the evidence, both oral and documentary, on this question, are of opinion that no sufficient reason has been shown for interfering with the finding of fact of the learned Subordinate Judge, who was in a much better position to gauge the truth and value of the oral evidence than the learned Judges of the High Court.

In their Lordships' opinion, therefore, the appellant must be credited with the value of the seven red cedar logs, which appears from the evidence to have been Rs. 464.

(2) With reference to the balance of the 25 logs, the High Court held as follows :

As regards the balance of 18 logs, a finding must be arrived at with reference to the general probabilities.

Venkatasubba Rao, J., who delivered the main judgment of the High Court, stated that a close scrutiny of the entries in the respondents' books had been made, and that the appellant had not been able to show from the respondents' books that more than 316 logs had been received by them.

The learned Judge added that the confusion had resulted from the hopeless way in which the respondents dealt with the logs in their account books, and that he fully endorsed the view expressed by the

Commissioner, who had been deputed to examine and report upon the accounts, that the respondents' books were extremely misleading and that no uniform practice was observed in regard to the making of entries in respect of the logs.

In view of this criticism it is obvious that the failure to find the 18 logs in the entries in the respondents' books by itself cannot be any sufficient answer to the appellant's case that the 18 logs had been delivered; yet the learned Judges of the High Court seem to have based their conclusion in respect of this matter mainly on the fact that they could not trace the 18 logs in the respondent's books.

The Commissioner, whose examination of the books, documents and evidence seems to have been very exhaustive and careful, made a report which set out the materials available for deciding the question whether the 18 logs and the 7 red cedar logs were delivered by the appellant to the respondents. The Commissioner did not come to any definite conclusion on the above-mentioned question, but having considered the evidence and the Commissioner's report, their Lordships are of opinion that there was sufficient evidence to justify the learned Subordinate Judge's finding of fact that the 18 logs had been delivered by the appellant to the respondents and that the total number of logs so delivered was 341 and not 316 as alleged by the respondents.

The learned counsel, who appeared for the appellant, was not able to assist their Lordships upon the question of the value of the 18 logs, and although it is clear that the appellant is entitled to credit for a considerable sum in respect thereof, their Lordships are not able to ascertain the exact value of the said 18 logs.

Their Lordships, however, do not consider it necessary to direct a further inquiry merely in respect of this one matter, having regard to the conclusion at which they have arrived on the question of measurement.

Their Lordships are of opinion that the second point viz.: the measurement of the logs, is of great importance in this case.

The Commissioner reported that the parties were at considerable variance regarding the measurement and quality of the logs which had been supplied. He drew attention to the fact that the respondents did not take measurements

until some time after delivery, that the timber passing rough books were in some cases most misleading and unreliable, that the respondents' selling measurements were a little more than the purchasing measurements, that a slight difference in the girth would be considerable when the contents were calculated, that two measurements for almost all the logs appeared in the respondents' books, and that the appellant was given credit for the lesser measurements only.

The explanation given by the respondents to the Commissioner was that the greater measurements denoted the measurements of the logs as they were without deducting for sapwood, and the lesser measurements denoted the quantity after making an allowance for such conditions. At the trial and in the High Court the respondents endeavoured to justify their measurements by alleging a custom regarding them; viz., firstly, that fractions short of $\frac{1}{4}$ kole should be deducted out of length; secondly, further deduction should be made of $\frac{1}{4}$ kole in length and $\frac{1}{4}$ viral in girth; and thirdly, should the log be defective such deductions as the common measurer allows should be made.

The learned Judges of the High Court held that the evidence given on behalf of the respondents for the purpose of proving the custom could not be accepted, and the learned Judge who delivered the main judgment, concluded his remarks upon this part of the case with this significant passage:

My finding therefore on the question of measurements is against the defendant (now the appellant). I would, however, add that but for the conduct and acquiescence on the part of the defendant I should not be disposed to find this issue in favour of the plaintiffs (now the respondents) because the evidence shows that they are prepared to deviate from the straight course in order to make some profit and also because on their own showing their selling measurements do not correspond with their buying measurements.

It is clear, therefore, that the learned Judge would not have disagreed with the finding of the learned Subordinate Judge on this point but for the fact that he thought that the appellant had by his conduct and acquiescence agreed to the respondents' figures as regards measurements.

Their Lordships are of opinion that the respondents have not shown any sufficient reason (apart from the question of acquiescence which will be dealt with presently) for disturbing the finding of

the learned Subordinate Judge in respect of the measurements.

The learned Judges of the High Court held that the appellant had by his conduct precluded himself from questioning the correctness of the measurements as recorded by the respondents; they relied chiefly on the correspondence, and upon the fact that the appellant did not attend at the respondents' place of business for the purpose of checking the measurements taken by the respondents though he was invited by them so to do.

The appellant was not obliged to attend at the respondents' place of business to check their measurements; it might have been wise for him to attend, but if he chose to rely upon the measurements taken by himself or by his own servants, in the event of a dispute, he was entitled so to do.

Their Lordships do not think it necessary to refer to the correspondence in detail. It was alleged that some of the letters purporting to have been sent by the appellant to the respondents had been fabricated by him for the purposes of this case—in particular the letter No. 197, dated 5th October 1916, marked Ex. 21 (B.) was referred to.

The first general account, sent by the respondents to the appellant, was dated 2nd October 1916, and the defendant alleged that the above-mentioned document was a copy of his reply thereto. Having regard to the admitted letters, their Lordships do not think it necessary to express any opinion on the question of the alleged fabrication; they must, however, point out that their attention has not been drawn to any part of the cross-examination of the appellant in which the allegation of fabrication was specifically put to him, as it should have been, if it was intended to rely upon it subsequently. It is to be noted that Venkatasubba Rao, J., stated that he did not believe that the appellant had acknowledged the above-mentioned account (Ex. 56) to be correct.

The second general account, sent by the respondents to the appellant, was dated 19th August 1917, and on 1st September 1917, the appellant wrote to the respondents complaining that the schedule of accounts was not signed, and that the numbers put on the timbers by him had not been entered in the schedule, and that it was not possible for him to ascer-

tain exactly the measurements; he asked the respondents for a further signed account. This at all events cannot be taken as an acceptance of the respondents' measurements.

The respondents received that letter, and replied that the appellant's numbers might have been washed out, and it would be difficult to send such numbers; and they suggested that the appellant should be present when the timber was measured.

Having considered the correspondence and the evidence, their Lordships are of opinion that it is not possible to hold that up to 1st September 1917, there was any such acquiescence by the appellant in the respondents' measurements as debarred him from disputing them at the trial. On 23rd Feb. 1918, the appellant through his vakil, called upon the respondents to execute a conveyance, and alleged a delivery of 1,087 candies of timber, which allegation was no doubt based on his own measurements.

On the 4th March 1918, the respondent replied, disputing the appellant's figures and alleging a breach of the contract by the appellant.

With much respect to the learned Judges of the High Court, their Lordships are of opinion that it has not been proved that the appellant by his "conduct and acquiescence," agreed to the measurements taken by the respondents.

The result in their opinion is that the learned Subordinate Judge's finding on this point must be upheld, and that the appellant is entitled to credit in respect of logs supplied to the respondents under the agreement for the sum of Rs. 15,074-10-10 which is the cost of 341 logs after deducting the 10 per cent. discount and 1 per cent. brokerage specified in the agreement.

From this amount there is to be deducted the sum of Rs. 4,361-15-9. This is made up as follows: Rs. 4,184-15-0 and Rs. 120 on account of cart hire, and Rs. 57-0-9 for unloading charges. The result is that the appellant is entitled in respect of logs delivered to the respondents under the agreement to be credited with the sum of Rs. 10,712-11-1.

Their Lordships therefore are of opinion that, subject to the question whether the deliveries were in time, the cost of the timber supplied by the appellant to the respondents was more than the sum mentioned in the agreement of the 27th November 1915, viz., Rs. 9,000 and

that the appellant was entitled to have the property, mentioned in the schedule thereto, assigned to him in accordance with Cl. 10 of the agreement.

The High Court found that time was of the essence of the contract, but that there was no doubt that the respondents extended the time for the performance of the contract in regard to the supply of the 1,000 candies of timber: the learned Judge who delivered the main judgment stated that the "contrary was not seriously suggested."

Their Lordships have no hesitation in agreeing with this finding, and they are also of opinion that the whole of the above-mentioned 341 logs of timber delivered by the appellant to the respondents were supplied during the subsistence of the contract.

That being so, the condition referred to in Cl. 10 of the agreement was performed by the appellant, and he is entitled to have the assignment of the property therein mentioned.

The learned Subordinate Judge dealt with accounts relating to other matters, such as promissory notes, scantlings, etc. Their Lordships were not asked to deal with the accounts relating to these matters, and they adopt the conclusions of the learned Subordinate Judge in respect thereof.

Their Lordships therefore are of opinion that the appeals should be allowed, that the judgment and decrees of the High Court should be set aside, that the decrees of the learned Subordinate Judge in suit No. 27 of 1919 should be restored that the decree of the learned Subordinate Judge in suit No. 28 of 1919 should be varied by directing that the defendants should execute a conveyance to the plaintiff at the plaintiff's cost in respect of the suit property within three months from the date of the Order in Council to be made on this appeal, and that in default the deed of conveyance shall be executed by the Court of the learned Subordinate Judge; that the other directions contained in the said decree should stand, and that the respondents should pay to the appellant his costs both in the High Court and in this appeal, and they will humbly advise his Majesty accordingly.

D.D. *Appeal allowed.*

Solicitors for Applt.—*Hy. S. L. Polak.*

Solicitors for Respds.—*Douglas Grant and Dold.*

A. I. R. 1927 Privy Council 270

(*From Nigeria*)

27th June 1927

VISCOUNT HALDANE, LORDS ATKINSON, BLANESBURGH, AND WARRINGTON OF CLYFFE.

Sunmonu—Appellant.

v.

Disu Raphael, (*represented by Awanotu*)—Respondent.

Privy Council Appeal No. 30 of 1926.

African Law—Joint family—Land belongs to community or family but not to individual—Son, though holding exclusive possession of the land after father's death, holds it on behalf of the family and cannot acquire title by lapse of time—Adverse possession.

The notion of individual ownership is quite foreign to native ideas in Africa. Land belongs to the community, the village or the family; never to the individual. All the members of the community, village or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it, and any member who wants a piece of it to cultivate or build a house upon goes to him for it. But the land so given still remains the property of the community or family. Where, therefore, a son holds land after his father's death, he must be deemed to hold for the family and cannot acquire exclusive title to it by lapse of time. [P 271 C 2]

H. C. Biechoff and *R. F. Irving*—for Appellant.

Viscount Haldane.—The appeal before their Lordships comes from the Supreme Court of Nigeria, and that Court affirmed a judgment of Mr. Justice Pennington, sitting as Judge of the Divisional Court. The appeal is that of the defendant and the defendant appeals on the ground that he was entitled to enforce his right to the property in question. The original respondent is dead and he is represented by Awanotu, a daughter, but she has not appeared on this appeal, whether from want of money or otherwise is not important. Anyhow those were the parties.

The claim was to land in Victoria Road at Lagos, and the claim was that of the plaintiff, who is called Disu Raphael, now deceased. Disu Raphael said that this was property which belonged to the family, and he claimed a declaration that the property was the property of

Sule Raphael, deceased, his father, and he claimed it for himself and for the rest of the family of Sule Raphael. The defendant, Sunmonu, was a half-brother of Disu Raphael. They were both sons of Sule Raphael but by different mothers. It was claimed at one time that Sule Raphael had made a Christian marriage in Brazil with a Christian woman, and that consequently, according to the law of Nigeria, his property went according to English law, so that his oldest son, Disu Raphael, would have been exclusively entitled. This, however, was not urged at the Bar, and could not have been successfully urged because both Courts concurred in finding that the Christian marriage was not established. There was, therefore, a native marriage, and, according to the native law the property which descended, that is the estate, went for the benefit of the family.

It is very important to have clearly in mind what the native law relating to the land in Lagos really is. It is the more important because there have been various misconceptions of that law in decisions from time to time, some of which have been cited in this case, but they were finally laid to rest by the decision in *Amodu Tijani v. Secretary of Southern Nigeria* (1), a decision of this Board. At p. 404 in the judgment of the Board the title to native lands is explained. It is stated that it is the characteristic of the native title that what has been called in native cases where similar questions arise, the radical title of the Crown applies, and the right of the native is a usufructuary right, and it is a usufructuary right which extends prima facie to the whole family. Their Lordships are aware that it is possible by special conveyancing to confer title on individuals in West Africa, but it is a practice which is not to be presumed to have been applied, and the presumption is strongly against it. Prima facie the title is the usufructuary title of the family, and whoever may be in possession of the legal title holds it with that qualification. The matter is very well stated in the report made by Chief Justice Rayner on Land Tenure in West Africa. It is a report made in 1898, and the passage to which reference made is adopted by the Privy Council in the case of *Amodu Tijani v. Secretary of*

Southern Nigeria (1), which is called the White Cap case. Chief Justice Rayner says :

The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it, and any member who wants a piece of it to cultivate or build a house upon, goes to him for it. But the land so given still remains the property of the community or family.

Their Lordships are aware that that was said of the title of the White Cap Chiefs. Their title was the question in that case, but the principle applies generally.

Sunmonu was sued in the way stated by Disu Raphael, and he pleaded possession, the Statute of Limitations, and also a purchase and the grant of the primary title to it. The history of the primary title is this : Before 1895, when Sule Raphael died, he had bought the land from Agobodeh, who had a Crown grant of it dated 1866, that is, he had a Crown certificate ; he had no conveyance. It does not appear to have been usual in these days for the Crown to make grants ; they granted a certificate of title. That was acquired by Sule Raphael from Agobodeh, and he took over the Crown document at the death of Sule Raphael. Sunmonu and other members of the family were in possession. Shortly afterwards the others departed, leaving Sunmonu in sole possession. In 1905 Sunmonu went and got a fresh primary title for himself. He surrendered the old one and got a new document comprising the land in question and additional land.

Now various things were set up. Sunmonu said he had purchased from his mother, the widow of Sule Raphael ; but the Courts below agreed in pointing out that the lady could have no right to sell, and that, more than that, the land officer of the Crown, the Commissioner, would have had no power to grant a new title which varied or superseded the old one, and the new grant must, therefore, be regarded as made to Sunmonu on behalf

(1) [1921] 2 A. C. 399 = 50 L. J. P. C. 236.

of the family, and they also said that there was no evidence of acquiescence in exclusive occupation by Sunmonu to the exclusion of the other members of the family. The usufruct remained right through, whether they exercised it or whether they did not, and it was quite usual for somebody to be in possession as trustee for his family, and, therefore, his occupation was in contemplation of their right.

The Courts agreed in finding the facts as stated, and what they say is well expressed in the concluding paragraph of the judgment of Chief Justice Van der Meulen. The result is that Sunmonu must be taken to have got in consistently with a native title and to have got in on behalf his brother and sisters and the family generally.

In that state of things no Statute of Limitations could render any assistance to the appellant, there is no evidence about acquiescence, and the result is that their Lordships do not feel themselves able to disturb the judgments of the Court below, which are unanimous.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed. As the respondent has not appeared there will be no order as to costs.

D.D. *Appeal dismissed.*

Solicitors for Appellant—*Lawrence, Jones and Co.*

Respondents—*Ex parte.*

A. I. R. 1927 Privy Council 272

(From Trinidad and Tobago.)

21st July 1927

VISCOUNT HALDANE, LORDS ATKINSON,
BLANESBURGH, DARLING, AND
WARRINGTON OF CLYFEE.

Royal Bank of Canada—Appellant.

v.

Joseph Salvatori—Respondent.

Privy Council Appeal No. 111 of 1926.

(a) *Contract Act, S. 124*—Contract of guarantee—Guarantor undertaking to pay creditor certain sum if creditor would continue to deal with debtor—Creditor not continuing to deal—Guarantor is not bound to fulfil the contract.

A contract of guarantee provided: "In consideration of the Royal Bank of Canada, agreeing to continue to deal with Antoni Brothers, herein referred to as 'the customer,' in the

way of its business as a Bank, the undersigned hereby jointly and severally guarantee payment to the Bank of the liabilities which the customer has incurred or is under or may incur or be under to the Bank, whether arising from dealing between the Bank and the customer or from other dealings by which the Bank may become in any manner whatsoever a creditor of the customer." The Bank failed to perform their covenant in that they did not continue to deal with the firm as their customer in the way of their business as a Bank.

Held: that the guarantor also was not bound to perform that covenant by reason of this failure: *The River Wear Commissioners v. Adamson*, 2 A. C. 734, *Rel. on.* [P 274 C 1, 2]

(b) *Deed—Construction—Intention must be seen.*

The principles of construction of statutes on which the Courts of Law act in construing instruments in writing—and a statute is an instrument in writing—are that in all cases the object is to see what is the intention expressed by the words used. But where the language is imperfect, and it is impossible to know what the intention is without inquiring further, the circumstances with reference to which the words were used should be looked to.

[P 274 C 2]

F. P. M. Schiller and H. G. Robertson—for Appellants.

D. M. Pritt and W. Lewis—for Respondent.

Lord Atkinson.—This is an appeal from the judgment of the Supreme Court of Trinidad and Tobago, dated 24th February 1926, dismissing with costs an action brought by the appellants against the respondent upon a guarantee signed by the latter and dated 23rd March 1921, to recover the sum of \$5 000, or £1,041 13s. 4d., its equivalent in sterling.

By an order of the Supreme Court, dated 21st June 1926, final leave to appeal to His Majesty in Council was granted to the appellants.

The appellants at all material times were and are Banking Corporation registered in Canada with a Branch at Port of Spain, Trinidad. The respondent was and is a merchant carrying on business at Port of Spain, and at the date on which the said guarantee was given was the sole partner of the firm of Salvatori Scott & Company. Antoni Brothers at all material times were a partnership firm carrying on business, inter alia, as cocoa merchants at Port of Spain. The firm consisted of three brothers named Antoni and a fourth partner named Roque Antoni. This firm was distinct from Antoni Hermanous, a partnership carrying on business in Venezuela, as was so

found by His Honour Mr. Justice Adrian Clark, who tried the action.

This firm of Antoni Brothers was, in March 1921, heavily indebted to their bankers, the appellants, on two separate accounts: the first, their current account, on which they were indebted in the sum of \$1,592.63, and the second, a loan account, upon which they were indebted in the sum of \$57,000. In respect of this latter indebtedness the bank held as a security two promissory notes of the firm, dated respectively 6th March 1920 and 23rd July 1920, for the respective amounts of \$40,000 and \$17,000.

It was not questioned in the argument before the Board that during the year 1920, if not before, the firm had obtained from their bankers, the appellants, large advances of cash on credit, to enable them to purchase quantities of cocoa to carry on their trade or business of dealers in that commodity.

In the winter of 1920-21 the market for cocoa in Trinidad simply collapsed, entailing upon this firm losses so heavy as to threaten bankruptcy. To add to their misfortune, the appellants, near the end of the year 1920, ceased to make advances to the firm, as they had theretofore done, to enable them to carry on their trade, with the result that the firm had no capital to carry on their business, and were practically insolvent.

They held, no doubt, at this period documents of title to quantities of cocoa shipped by them, and were entitled in respect thereof to rebates on freight amounting, in the whole, to about \$3,000. They were also entitled to an equity of redemption in a certain house worth \$4,000. These two pieces of property constitute the entire assets of the firm. Both were transferred by them to the appellant bank as security for the debts they owed to that institution. The firm, from about the end of the year 1920, had owing to their complete lack of capital and their insolvent condition, practically ceased to attempt to carry on their business of cocoa dealers, so that it had become quite obvious that, unless they could obtain financial assistance in the shape of advances of capital, they would never be able to regain to any extent their former commercial position, and would be forced to summon a meeting of their creditors. The instrument of guarantee is, with the exception of the last

clause of it, a printed document. It is under seal, and is signed by the guarantor under the name and style of Salvatori Scott & Co.

Before dealing with the construction of its language, it is necessary to consider the condition of things out of which it sprung, and the objects apparently designed by the parties to it to be effected by it. The manager of the bank at the date of this guarantee was one Jerram Connell. He ceased to be manager in January 1923, when he went to reside in New York. He was examined in the latter city on commission on 25th August 1925. While he was manager a gentleman named Herman Paul Urich was assistant manager. He succeeded Mr. Connell as manager, and was examined as a witness at the trial on behalf of the bank. For some reason not avowed or even suggested, neither Jean Marie Antoni, the principal partner in the firm, nor the member of the firm who signed the deed of guarantee, was called as a witness, though both were apparently available but the accountant of the firm, one John Anthony Antoni by name was examined as a witness at the trial. (The judgment then discussed the evidence of several witnesses and proceeded.) Before dealing with the construction of the language of the guarantee deed, it would be well to point out that if the construction of it, for which the appellants contend is its true construction, the engagement into which the guarantor entered was reckless and improvident to the last degree. Antoni Brothers assigned to the bank all their local assets. They were stripped bare of all property, yet the guarantor bound himself to pay to the bank \$5,000 per annum for eight years—\$40,000 in all—and failed to obtain from the bank any contract to give to the firm the advances on credit which were obviously the only means by which it could be hoped that the firm could recapture its former business and perhaps ultimately become solvent. The payment of the \$40,000 would have still left the firm a debtor to the bank to a large extent, and the guarantor would have failed to gain for the firm the benefit he plainly desired to secure for them.

It is only necessary to set out at length the first and last clauses of this deed of guarantee. They were as follows:

To the Royal Bank of Canada.

In consideration of the Royal Bank of Canada agreeing or continuing to deal with Antoni Brothers, herein referred to as "the customer" in the way of its business as a bank, the undersigned hereby jointly and severally guarantee payment to the Bank of the liabilities which the customer has incurred or is under or may incur or be under to the bank, whether arising from dealing between the bank and the customer or from other dealings by which the bank may become in any manner whatsoever a creditor of the Customer; including in such liabilities all interest, computed with quarterly or other rests according to the bank's usual custom, charges for commission and other expenses, and all costs, charges and expenses which the bank may incur in enforcing or obtaining payment of any such liabilities (the joint and several liability of the undersigned hereunder being limited to the sum of forty thousand dollars without interest).

And the undersigned agree that the bank may refuse credit, grant extensions, take and give up securities, accept compositions, grant releases and discharges, and otherwise deal with the customer and with other parties and securities as the bank may see fit, and may apply all moneys received from the customer or others, or from any securities upon such part of the customer's indebtedness as it may think best, without prejudice to or in any way limiting or lessening the liability of the undersigned under this guarantee effect.

And the undersigned specially waive and renounce any benefits of discussion and division.

And it is further agreed and it is a part of the guarantee herein contained that we undertake that the amount of \$5,000 (five thousand dollars) will be paid yearly commencing on the 1st March 1922 on the debt of Antoni Bros., herein guaranteed, and we make ourselves responsible to the bank for the said yearly payments up to the amount of our guarantee of \$40,000 (forty thousand dollars) without interest. It is understood that as long as the terms of this guarantee are fulfilled, and as long as no action is taken by the firm of Antoni Bros., or any of the partners which would be prejudicial to the interest of the bank in connexion with the advances which they have received from the bank, and as long as no legal action is taken against them by any of the other creditors, that no legal action will be taken against the firm of Antoni Bros. by the bank, but nothing herein contained shall prejudice the bank in regard to any claim they may have against the firm of Antoni Bros. in respect of any interest or any other moneys owing to them by the said firm over and above the said sum of \$40,000 (forty thousand dollars).

Sealed and dated Port of Spain, Trinidad, the 23rd March 1921 A. D.

Their Lordships do not think that the language of this deed is so ambiguous as the appellants contend that it is, but if it be so, then they think that the key to its construction is that laid down by Lord Blackburn, *The River Wear Commissioners v. Adamson* (1) 2 A. C. 734, at

p. 763. In the report he expressed himself thus :

... though no doubt the principles of construction of statutes laid down by this House in the present case must have an important effect on those who have to construe that or any other enactment. My Lords, it is of great importance that those principles should be ascertained ; and I shall therefore state, as precisely as I can, what I understand from the decided cases to be the principles on which the Courts of law act in construing instruments in writing ; and a statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used. But from the imperfection of language, it is impossible to know what that intention is without inquiring further, and seeing what the circumstances were with reference to which the words were used. . . .

Adopting that rule of construction, it is impossible, in their Lordships' view, having regard to the circumstances out of which the deed of guarantee arose and in reference to which its language was used, to suppose that what was intended was that these broken and insolvent traders, the firm, should get no help from the bank beyond leaving their account open, merely continuing to carry the liability, as Connell phrases it. The learned Judge, Mr. Justice Adrian Clark, said that the words

continuing to deal with Antoni Brothers in the way of its business as a bank must involve some bona-fide fresh transaction between the parties.

Their Lordships concur with him in this view. They think it is impossible to confine these words to merely keeping the account of this firm open, that is, merely receiving payment from anyone who chooses to pay in money to the bank to the firm's credit. The deed really contains two covenants or contracts, one being the consideration for the other, the first covenant being that if the bank continue to deal with the firm as their customer in the way of its business as a bank, the guarantor will pay to the bank the \$40,000 at the times and in the manner specified and do the other things he has undertaken to do. The bank have failed to perform their covenant, they have not continued to deal with the firm as their customer in the way of their business as a bank. The guarantor has not received the consideration, i. e., the whole of the consideration upon which his covenant was based. He is therefore not bound to perform that covenant by reason of this failure. The appeal, therefore, in their Lordships' opinion, fails.

and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

D.D. *Appeal dismissed.*

Solicitors for Appellants — Ashurst, Morris, Crisp & Co.

Solicitors for Respondent—Slaughter and May.

A. I. R. 1927 Privy Council 275

(From Australia)

4th July 1927.

VISCOUNTS HALDANE AND SUMNER,
LORDS SHAW AND DARLING, AND
LORD WARRINGTON OF CLYFFE.

George Richards Laffer—Appellant.
v.

Francis Arnold Gillen—Respondent.

Privy Council Appeal No. 105 of 1926.

Deed—Construction—Principles.

In construing a deed the Court should consider all the surrounding circumstances, the position of the parties to the agreement, its subject-matter, and the apparent purpose and object thereof, and in particular the provisions to be construed. [P 278 C 2]

At the conclusion of the War the Government of South Australia was faced with the problem of dealing with numbers, of discharged soldiers, and determined to make provision for the settlement of such men on unoccupied Crown lands and for advances out of public funds to men so settled. [P 276 C 1]

The respondent, a discharged soldier, who had some training on a Government training farm, by a letter applied for a grant of the lands in question. His application was granted. He later on accepted an agreement over the land which was to be for a term of 65 years, and thereby the vendor agreed to sell and the purchaser to purchase the land as therein described. One of the conditions in the agreement was: "If at any time within the period of ten years from the date of this agreement the vendor is satisfied on such evidence as he deems sufficient that by reason of incompetency or personal disability the purchaser is incapable of managing the said land with advantage to himself or that the purchaser has neglected to work the land satisfactorily or has been guilty of serious misconduct during his occupation thereof, the vendor by notice in writing given to the purchaser may determine this agreement upon and subject to such terms and conditions as the vendor thinks fit (and) upon the expiration of three months from the giving of such notice the agreement and the right of the purchaser to complete the purchase and possession of the said land shall cease and determine and be void, anything in this agreement to the contrary notwithstanding." [P 276 C 1, P 277 C 1]

It was contended that before deciding to terminate the agreement it was incumbent upon the vendor to institute some judicial or quasi

judicial enquiry or at the least to communicate to the purchaser the information he had received and his intention to act thereon and give him an opportunity of stating his case in answer thereto. [P 275 C 2]

Held: that no such enquiry was contemplated that the vendor was exercising a merely administrative function and was entitled to form an opinion on such materials as he himself thought sufficient. [P 279 C 1]

P. H. Mangham and F. V. Smith—for Appellant.

H. Cunliffe and A. A. Uthwatt—for Respondent.

Lord Warrington of Clyffe.—By the Crown Lands Act, 1915, of South Australia it was provided (S. 9, xiii) that the Commissioner of Crown Lands might authorize any person to take possession of lands, messuages, or tenements belonging to the Crown whereon any person is in unauthorized possession or occupation and to forcibly eject every person therefrom.

Early in May 1923, the appellant, as Commissioner, purporting to act under the aforesaid statutory power authorized certain constables to take possession of the lands now in question and to forcibly eject the respondent therefrom; they took possession of such lands accordingly and ejected the respondent therefrom.

Shortly afterwards the respondent, as plaintiff, instituted the present action against the appellant as defendant, claiming damages for the entry and ejection, alleging that it was wrongful.

The appellant pleaded the above-mentioned statute, alleging that the respondent was in unlawful possession or occupation of the lands in question.

The question, then, is whether the respondent at the time of his ejection therefrom was in unlawful possession or occupation of the lands.

The action was tried on the question of liability only by Pool, J., who by his judgment dated 17th April 1924, decided in favour of the respondent.

On appeal to the Full Court this judgment was reversed by Murray, C. J., Angus Parsons, J., and Napier, J., who by their judgment dated 12th August 1924, allowed the appellant's appeal and ordered the respondent to pay the costs of the action.

The respondent appealed to the High Court of Australia, who, on 17th December 1925, by a majority (Higgins, J., dissenting), allowed the appeal with costs, and restored the judgment of Pool, J.

The present appeal is brought by special leave of His Majesty in Council, the appellant undertaking to pay the respondent's costs of the appeal as between solicitor and client in any event.

There has thus been a very considerable difference of opinion in the Courts of the State and Commonwealth and even those Judges who came to a conclusion favourable to one side or the other were by no means unanimous in their reasons for their decisions.

At the conclusion of the War the Government of South Australia was faced with the problem of dealing with numbers of discharged soldiers, and determined, amongst other things, to make provision for the settlement of such men on unoccupied Crown lands and for advances out of public funds to men so settled, and for this purpose obtained the passing of the Discharged Soldiers' Settlement Act, 1917, and subsequent amending Acts. The administration of these Acts was entrusted to the Minister of Repatriation, a corporation sole created by the Act of 1917.

The appellant at all material times held the two offices of Commissioner of Crown Lands and Minister of Repatriation.

It is obvious that for the success of such a scheme two main objects were in view—the proper cultivation and development of the land and the advantage of the men settled thereon. Superintendents and inspectors were appointed whose duty it was to inform themselves of the conduct and prospects of the settlers and to report thereon to the Minister.

The respondent, a discharged soldier, who had had some training on a Government training farm, by a letter dated 9th February 1918, applied for a grant of the lands in question, and on 25th February 1918, he was informed by letter of the Minister that his application was granted and of the conditions on which the land would be held. Except that the letter stated that for the first twelve months his occupancy of the land would be strictly probationary, it is unnecessary to set out its terms, inasmuch as they were embodied in the formal agreement to be presently mentioned.

The respondent appears to have been let into possession of the lands on 1st March 1918. On 25th April 1920, he

made a formal application for the grant to him of an agreement over the land.

The agreement is dated 1st March 1919, the day on which the probationary period expired, but it was not actually sealed by the Minister or signed by the respondent until 26th February 1921. It was treated before this Board as common ground that for purposes of construction and effect the date of the agreement is 1st March 1919.

The agreement purports to be made between the Minister of Repatriation of and for the State of South Australia contracting for and on behalf of His Majesty the King (thereinafter called the vendor) of the one part and the respondent (thereinafter with his executors, administrators and assigns called the purchaser) of the other part. It may be observed in passing that it is clear from the contract that in every passage material to the case "the vendor" means the Minister and not His Majesty himself.

The agreement was to be for a term of 65 years, and thereby the vendor agreed to sell and the purchaser to purchase the land as therein described for £ 2,106, subject to a reservation of minerals.

It is desirable to set out the provisions for payment of purchase money and interest. They are as follows:

3 The purchaser shall pay the said purchase money and interest thereon by instalments as follows:

(i) No instalments shall be payable for the first year of the term of this agreement.

(ii) During the succeeding four years of the term of this agreement the purchaser shall pay interest on the said purchase-money at the following rates.

For the second year at the rate of £2 10s. per cent., for the third year at the rate of £3 10s. per cent., for the fourth and fifth years at the rate of £5 per cent. per annum.

Such interest shall be payable by equal half-yearly instalments of £26 6s. 6d. during the second year, of £36 17s. 1d. during the third year, and of £52 13s. during the fourth and fifth years of the said term, such instalments to be paid on the 31st and 28th days of the month of August and February respectively in each year.

(iii) During the remainder of the term of this agreement the purchaser shall pay the said purchase-money and interest on the balance thereof for the time being unpaid at the rate of £5 per cent. per annum.; by half-yearly instalments of £55 10s. 11d., such instalments to be paid on the days of the months lastly hereinbefore mentioned in each and every year until the whole of the said purchase-money and interest shall have been paid.

Then follow certain conditions as to residence, the proper cultivation and

improvement of the land, and other matters not material to be set forth in detail.

Cl. 22 is as follows:

If at any time within the period of ten years from the date of this agreement the vendor is satisfied on such evidence as he deems sufficient that by reason of incompetency or personal disability the purchaser is incapable of managing the said land with advantage to himself or that the purchaser has neglected to work the land satisfactorily or has been guilty of serious misconduct during his occupation thereof, the vendor by notice in writing given to the purchaser may determine this agreement upon and subject to such terms and conditions as the vendor thinks fit [and] upon the expiration of three months from the giving of such notice, this agreement and the right of the purchaser to complete the purchase and to possession of the said land shall cease and determine and be void, anything in this agreement to the contrary notwithstanding. [The insertion of "and" though not in record, seems necessary].

After a provision in Cl. 23 for return in the event of surrender or forfeiture of instalments of purchase money already paid and for certain allowances for improvements, Cl. 24, so far as it is material, is as follows:

And it is hereby declared that if any of the instalments hereby reserved shall be unpaid and in arrear for more than six months after the day whereon the same is hereby made payable the purchaser having had at least three months' previous notice in writing demanding its payment this agreement may be cancelled by the vendor . . . and the vendor may thereupon insert a notice in the Government Gazette declaring this agreement to be forfeited and such notice appearing in the Government Gazette shall in all Courts and elsewhere and under all circumstances be taken to be conclusive evidence that this agreement has been legally cancelled and forfeited.

The respondent never paid any of the instalments of interest payable under Cl. 3 (ii) of the agreement, and on 21st December 1921, there remained due the following, viz.:

The payment due on 31st August 1920, £26 6s. 6d.; that due on 28th February 1921, £26 6s. 6d., and that due on 31st August 1921, £36 17s. 1d. It will be observed that of these payments the first two only were then six months in arrear.

On 21st December 1921, the Assistant Secretary for Lands wrote and sent to the respondent the following letter:

I am directed by the Hon. Commissioner for Crown Lands to advise you that it is intended to cancel Soldiers' Acquired Agreement No. 30 and to re-offer the land unless all arrears are paid within two months from this date.

In the event of forfeiture taking place as indicated, you will be liable for payment of

amounts due up to the date of actual cancellation.

Payment due 31/8/20	...	£26 6s. 6d.	} and interest thereon.
" 28/2/21	...	£26 6s. 6d.	
" 31/8/21	...	£36 17s. 1d.	

Agreement No. 30 is the agreement in question.

After some correspondence the Secretary for Lands on 15th November 1922, wrote to the respondent a letter in which he informed him that the agreement had been cancelled and the land was then Crown land and would be dealt with at an early date.

In the Government Gazette of 7th December, 1922, there was published the following notice dated 6th December 1922:

Notice is hereby given that the lease and agreements mentioned and described at the foot hereof have been cancelled by the Commissioner of Crown Lands in terms of S. 63, Crown Lands Act, 1915 and are hereby declared forfeited.

(Signed) Geo. R. Laffer,
Commissioner of Crown Lands and Immigration.

There then follows a reference to the agreement in question and the words "non-payment of arrears."

Finally, to complete this part of the story, on 22nd December 1922, the appellant, as Commissioner of Crown Lands, signed a notice addressed to the Registrar-General and expressed to be given, in pursuance of S. 94 of the Real Property Act, 1886, that the Crown lease therein mentioned, being the agreement in question, had been lawfully and wholly determined.

This notice was sent to the Registrar-General on 9th January 1923, and on 17th January 1923 a memorial thereof, as provided by S. 94 above mentioned, was duly entered in the Register of Crown Leases as provided by S. 94 above mentioned, by being endorsed on the copy of the agreement filed in such register as provided by S. 93 of the same statute. S. 94 is in the following terms:

The Registrar-General on receipt of notice from the Commissioner of Crown Lands that any Crown lease has been lawfully forfeited or determined in whole or in part, shall make an entry to that effect in the Register of the Crown Leases, and such forfeiture or determination shall thereupon have effect.

On 11th January 1923, the appellant, having been informed by the respondent's solicitors that in their opinion the notice of cancellation was not in order, consulted the Crown Solicitor, and was advised that it would be unsafe to rely on the document of 21st December 1921, either

as a notice in writing demanding payment within Cl. 24 of the agreement or as a notice in writing within the meaning of Cl. 22. He thereupon sent the respondent the following notice :

The Minister of Repatriation of and for the State of South Australia for and on behalf of H. M. King George V hereby gives you notice that he is satisfied upon evidence which he deems sufficient that you have neglected to work satisfactorily the land which by agreement for sale and purchase No. 80, Register Book, Vol. 645, fo. 10, you have agreed to purchase, namely, block 372, in the Hundred of Wongyarra, and block 340 in the Hundred of Gregory, and the said Minister accordingly hereby determines the said agreement, and gives you notice that, upon the expiration of three months from the giving of this notice, the said agreement and your right to complete the purchase and to possession of the said land will cease and determine and be void.

Dated the 24th day of January 1923.

(Signed) Geo. R. Laffer,
Minister of Repatriation.

To Francis Arnold Gillen.

This notice was duly posted, addressed in accordance with the provisions in that behalf of the agreement, and was registered at the post office. The respondent refused to take it in, and it was ultimately returned through the dead letter office. After the three months had expired the appellant, as already mentioned, caused possession to be taken of the land, and ejected the respondent therefrom.

On these facts the appellant makes the following submissions :

1. That the letter of 21st December 1921 was a sufficient three months' notice in writing demanding payment of the arrears and that as default was made in such payment he was, as vendor, justified in cancelling the agreement which was accordingly lawfully forfeited or determined.

2. That whether it was so or not such forfeiture or determination had effect under S. 94 of the Act of 1886 upon the entry above mentioned being made in the Register of the Crown Leases pursuant to the notice of 22nd December 1922.

3. That whether the agreement had already determined or not it was so determined at the expiration of three months from the date of the notice of 24th January 1923.

4. That if he establishes any one of these submissions the respondent was on 1st May 1923 in unauthorized possession of the land in question and his ejection therefrom was justified by S. 9 (xiii) of the Crown Lands Act, 1915.

As the appellant's final proceedings were based upon the provisions of Cl. 22 of the agreement and the notice of 24th January 1923 their Lordships propose to deal with this point first.

The contention of the respondent on this point is that before deciding to terminate the agreement it was incumbent upon the appellant to institute some judicial or quasi-judicial enquiry, or at the least to communicate to the respondent the information he had received and his intention to act thereon and give him an opportunity of stating his case in answer thereto.

The question is entirely one of construction, and in common with all such questions can only be properly answered after a consideration of all the surrounding circumstances, the position of the parties to the agreement, its subject-matter, and the apparent purpose and object thereof, and in particular of the provisions to be construed.

In the present case the transaction to which the agreement related was effected under the provisions of Acts of Parliament specially passed for the purpose of providing for discharged soldiers and in particular by settling them on unoccupied lands for the twofold purpose of developing such lands and at the same time affording to the soldier settlers the opportunity of making good in life.

The administration of the Acts was entrusted to a special Minister called the Minister of Repatriation who was, of course, responsible to Parliament for his conduct in the matter.

The clause in question was inserted in the agreement in pursuance of an imperative regulation made under the Acts in question and having the force of an Act of Parliament : see Record, p. 169, Regn. 13 (h).

It is obvious that the authorities contemplated that amongst the more or less experimental cases there would be a number of failures, and it seems not unreasonable to conclude that they intended to put into the hands of the responsible Minister means whereby such cases might be readily dealt with, and, if necessary, a fresh start made.

Turning to the words of the clause: it is provided that the power in question may be exercised by the vendor, viz., the Minister acting on behalf of His Majesty the King. The only conditions are that

it must be exercised within the first ten years, and that the vendor is satisfied on such evidence as he deems sufficient that one or the other of the specified grounds exists. There is nothing in the words used to suggest as essential to the satisfaction of the vendor any particular form of enquiry, judicial or otherwise. It may fairly be assumed that those who required the clause to be inserted in every agreement of the kind were well aware that the vendor would be assisted by officers whose duty it would be to ascertain and report to him the conduct and prospects of the soldier settler, and that he would thereby be furnished with evidence which he might well deem sufficient to enable him to form a judgment. Merely to inform the person affected of what was in contemplation would be useless unless he was also given some particulars of the information on which the vendor proposed to act and to give such information, if it consisted as it probably would, of reports from the Minister's officers, would render their position impossible, and the knowledge that such might be the result would tend to defeat the object with which they were appointed, viz., the obtaining of honest and true reports. Their Lordships agree with Higgins, J., in thinking

that nothing is further from the intendment of this clause than a judicial or quasi judicial enquiry.

They also agree with the following passage in his judgment :

The power is confined to the first ten years, as years of probation; the contract is one in which the chief object of the vendor is to benefit the purchaser because the purchaser is a man who has served the country in the Great War; the facts of which the Minister is to be satisfied involve issues of such a character as might lead to endless debate; and the Minister as administrator is under a duty to other returned soldiers to see that the first holder is not blocking them without advantage to himself and under a duty to the State to see that its generosity is not wasted.

In their Lordships' opinion the cases referred to in argument have no bearing on the present case. The vendor is under this clause exercising a merely administrative function, and is entitled to form an opinion on such materials as he himself thinks sufficient.

There is no suggestion that the appellant in the present case acted otherwise than in absolute good faith.

There appears at p. 23 of the Record at line 24 a passage of the appellant's evidence in which he gives a general descrip-

tion of the materials before him, and this shows that he acted with great care and deliberation.

On the whole their Lordships are of opinion that on this point the appellant is entitled to succeed.

The Board having come to this conclusion, it may be said that a decision on the other points is unnecessary. But they have been argued and various opinions thereon have been expressed in the Courts below, and their Lordships therefore think it right to state their own views upon them.

On the first point their Lordships have no hesitation in saying that the letter of the 21st December, 1921, was not a sufficient demand in writing within Cl. 24 of the agreement. It was, moreover, open to other attacks: it only purported to give two months for payment instead of three, one of the three sums or default in payment of which cancellation was threatened was not six months in arrear, and no distinction was made between it and the other sums, so that if the letter was, in fact, a demand, it would require payment of a sum to which the clause did not apply at all. Counsel for the appellant hardly pressed his submission on this point.

As to the effect of S. 94, this is a more difficult question, but their Lordships are of opinion that the appellant's contention is correct. The Registrar is directed to make the entry in the register by which effect is given to the forfeiture or determination on receipt of the notice from the Commissioner that the Crown lease in question has been lawfully forfeited. In this respect the Crown lease is placed in a different position from that occupied by an ordinary lease. In this case the lessor, seeking to have registered the fact of re-entry, has to prove the fact, and that it has taken place in manner prescribed by the lease to the satisfaction of the Registrar. The Registrar is then to make an entry in the register, and the estate of the lessee in the land is then to determine: see Real Property Act, 1886, S. 126.

If the view of the appellant is not correct, then the Crown is in a less favourable position than the ordinary person. In the latter case when once he has satisfied the Registrar and the necessary entry has been made in the register, the validity of the re-entry cannot be ques-

tioned, for the statute provides that the estate of the lessee in the land shall thereupon determine, whereas in the case of a crown lease, if the respondent is right, validity or otherwise of the forfeiture or determination might remain an open question until it should be decided whether it was lawful or not. It is more reasonable to suppose that in this case the duty of deciding the point was cast upon the responsible Minister whose view was to be taken as final so far as the register is concerned. The two cases would then be on the same footing, except only that in the one case the decision affecting the register would be that of the Registrar in the other that of the Commissioner.

The Judges in the Courts below who decided against the appellant on this point do so on the ground that the forfeiture or determination which is to have effect is a lawful forfeiture or determination. Their Lordships cannot agree with this view; the forfeiture or determination is that above referred to viz., one which the Commissioner in his notice says has been lawfully effected. It may be worth noticing that this is apparently the view taken by the Registrar, for in the endorsement on the agreement he says that it has been lawfully determined as appears by the notice from the Commissioner.

It has been suggested by the appellant that any hardship to individuals deprived of land by erroneous entries in the register is met by the provision in the Act contained for compensation either by the person responsible for an erroneous entry (S. 203) or out of the assurance fund (S. 208). Beyond saying that there appears to be something in the suggestion their Lordships express no opinion on the matter, as the point was not really before them. In their Lordships' view, therefore, the appellant fails on his first point but succeeds on this second. As he also succeeds on the third point he establishes his case on the fourth.

Their Lordships are therefore of opinion that this appeal should be allowed and the order of the High Court of Australia discharged, the order of the Full Court of South Australia being thus restored. As to the costs of this appeal the appellant, pursuant to his undertaking, must pay the costs of the respondent as between solicitor and client. Their Lordships will humbly advise His Majesty accordingly.

D.D.

Appeal allowed.

Solicitors for Appellant — Sutton, Ommanney & Oliver.

Solicitors for Respondent — Syrett & Sons.

JAMIA UNIVERSITY

Label Library

Acc. No ...

177133

Dated

15.11.1980

THE CRIMINAL CASES

A Monthly Journal

Contains

A Journal Section

AND

All Reportable CRIMINAL Judgments of the
Highest Courts in India and Burma and
of the Privy Council

Cases are reported much earlier than other Journals
reporting criminal cases in India.

A Vade Mecum to Mukhtars, Police Officers, Criminal Practitioners
and those interested in Criminal Law.

Published by :

GOPAL BALWANT JOSHI, B.A., LL.B., EDITOR,
The All India Reporter, Nagpur.

Annual Subscription

Rs. 10 Post free.

A. I. R. 1914-1920

(All Courts)

Separate Pagination for each Court

Price: Rs. 36.

for Each Year's Unbound Set with Indexes, carriage extra.

(SUPPLIED ALSO ON INSTALMENTS.)

Orders will be attended to by :

The Manager, A. I. R. Ltd., Nagpur.

THE ALL INDIA REPORTER

THE PREMIER LEGAL JOURNAL

Supplies every month, to the Legal Profession, a Complete Record of all the reportable cases of the **Privy Council** and of all the **Superior Courts** of **India** and **Burma**.

Contains an excellent Journal Section.

Has served the necessities of the Legal Profession completely as the leading Journal.

Saves time in picking out the references, saves money of the Lawyers and also saves space in the Library.

Separates points of a headnote and indicates them by reference to page and column by a black marginal mark.

Enables the reports of each Court to be bound separately, as the paging of each Court is continuous and separate.

Indexes and Comparative Tables, for each Court separately, are supplied free to purchasers of all the twelve parts of a year.



PRICE:

Subscription :— Rs. 3 plus postage per month

Back Volumes from 1914 can be had on easy instalment payment system.

For further particulars, please write to :

The Manager, A. I. R. Ltd., Nagpur.